SEP 16 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

NO. 74-287

GABLES BY THE SEA, INC.,
a Florida corporation,

Petitioner,

vs.

EMMETT C. LEE, JR., Colonel, U.S. ARMY CORPS OF ENGINEERS, DISTRICT ENGINEER, DEPARTMENT OF THE ARMY, JACKSONVILLE, FLORIDA DISTRICT, ROBERT F. FROEHLKE, SECRETARY OF THE ARMY, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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in the Supreme Court of the United States

NO. _____

GABLES BY THE SEA, INC.,
a Florida corporation, *Petitioner,*

vs.

EMMETT C. LEE, JR., Colonel, U.S. ARMY CORPS OF ENGINEERS, DISTRICT ENGINEER, DEPARTMENT OF THE ARMY, JACKSONVILLE, FLORIDA DISTRICT, ROBERT F. FROEHLKE, SECRETARY OF THE ARMY, and UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, GABLES BY THE SEA, INC., a Florida corporation respectfully prays for the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals, for the Fifth Circuit, entered and rendered in the above entitled cause on July 9, 1974, to which a petition for rehearing was denied on August 2, 1974.

DECISIONS BELOW

I. Federal decisions:

a. The judgment of the Court of Appeals affirming the decision of the United States District Court for the Southern District of Florida granting summary judgment for the Respondents has not been officially reported at this time but appears as "A" in the Appendix accompanying this petition. The appellate court's decision was rendered without the benefit of oral argument, the cause having been disposed of on the summary calendar. The order of the Court of Appeals denying the petition for rehearing appears as "B" in the Appendix.

b. The United States District Court for the Southern District of Florida's order granting summary judgment to the Respondents is not reported but appears as "C" in the Appendix. The District Court did enter a memorandum opinion reported at 365 F.Supp. 826. A copy of that opinion appears as "D" in the Appendix. The District Court's order granting summary judgment was entered without Petitioner having been granted the opportunity for oral argument in opposition to the motion for summary judgment.

c. The District Court's summary judgment affirmed the decision of the United States Department of the Army and the United States Army Corps of Engineers denying an extension of a permit to dredge and fill a certain small, privately owned area along the Westerly shore of Biscayne Bay in Coral Gables, Florida. That decision was rendered without the benefit of a public hearing. A copy of that unreported decision appears

as "E" in the Appendix and a copy of the report of the Army Corps of Engineers upon which that decision is based appears as "F" in the Appendix.

II. State of Florida decisions:

a. The decision of the Circuit Court of the Second Judicial Circuit of Florida (Trial Court), not officially reported appears as "G" in the Appendix, and it established the Petitioner's right to dredge and fill its property for a period of two hundred and twenty three (223) days, which was the unexpired period of the original permit granted by the United States Army Corps of Engineers, that would have remained but for the illegal, unwarranted interference by the State of Florida.

b. The decision of the District Court of Appeal of Florida, First District, 251 So.2d 880 (Fla.App. 1971), appears as "H" in the Appendix and it affirmed the judgment of the Trial Court.

c. The Circuit Court (Trial court) rendered a post judgment order enforcing its final judgment, said order appears as "I" in the Appendix. The District Court of Appeals of Florida, First District, 258 So.2d 822 (Fla. App. 1972), quashed the appeal taken from that post judgment order and the Supreme Court of Florida denied certiorari. The appellate court ruling appears as "J" in the appendix.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28, U.S.C. §1254 and Rule 19(b) of the Rules of the Supreme Court of the United States. This cause involves vitally important questions of both Federal and State law which have not been settled by this Supreme Court of the United States and the decisions of the United States Court of Appeals, Fifth Circuit, the United States District Court for the Southern District of Florida, as well as the administrative decision of the Department of the Army and the United States Army Corps of Engineers have resulted in a drastic departure from the accepted and usual course of due process to such an extent as to deny this Petitioner its fundamental rights under the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED:

a. Whether or not a property owner can be constitutionally deprived of its vested property rights by governmental action without having been afforded a hearing or an opportunity for a hearing?

b. Whether or not the determination of the "public interest" involved in a proceeding pursuant to the requirement of the Water Quality Act, Title 33, U.S.C. §1171, et seq, as amended and reorganized in the Federal Water Pollution Control Act, Title 33, U.S.C. §1341, et seq, and the National Environmental Protection Act, Title 42 U.S.C. §4322, et seq, permits a decision based on public clamor rather than competent, substantial evidence that the requested activity will have an adverse impact on the environment?

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED:

This cause involves the Fourteenth Amendment to the Constitution of the United States; the Water Quality Act, Title 33, U.S.C. §1171, et seq, as amended and reorganized by the Federal Pollution Control Act of October 1972, Title 33, U.S.C. §1341, et seq; the National Environmental Protection Act, Title 42, U.S.C. §4321, et seq; the Code of Federal Regulations, Section 209.120(g)(1)(2); Local Rule 10 of the Federal District Court for the Southern District of Florida; and Local Rule 18 of the Court of Appeals for the Fifth Circuit. The pertinent parts of the above provisions are reprinted at "K" of the Appendix.

STATEMENT OF THE CASE

Gables by the Sea, Inc., purchased bay front property located in Coral Gables, Dade County, Florida, from the Trustees of the Internal Improvement Trust Fund of Florida for residential uses and purposes. To enable development the Trustees sold to Gables by the Sea sufficient bay bottom to fill the property. Petitioner subdivided its property, which was zoned for residential purposes, and paid taxes on that basis. Without filling the property, it cannot be used for any purpose.

The United States Corps of Engineers granted a permit to complete the dredging and filling of the subdivision which did not expire until December 31, 1968. (A-L)[1] In 1972 Petitioner applied for an extension and

[1]The symbol "A" will be utilized to designate pages of the appendix to this Petition.

renewal of that permit. (A-M) The Department of the Army and the Corps of Engineers denied the requested permit without granting Petitioner a hearing.

Gables by the Sea, Inc. filed its complaint in the United States District Court for the Southern District of Florida alleging essentially that it was denied of a valuable property right without the benefit of procedural due process in the form of a public hearing and without the benefit of substantive due process in that the Department of the Army and the Corps of Engineers denied the renewal and extension of the permit on the alleged basis that the project would be contrary to the public interest without making a finding that the project would cause ecological damage to that degree and extent that would in fact make it contrary to the public interest. The Corps of Engineers based their denial of the requested permit upon the following findings:

> "Based on an evaluation of the comments by both the developer and state and federal agencies competent to make an evaluation of ecological factors incident to the proposed development, it is my conclusion that the degree of ecological damage to be occasioned by the project is subject to conjecture. There will however be some irreversible commitment of biologically productive areas resulting in ecological damage of one degree or another. More significant however is the lack of public acceptance of the project. Opposition to the project by virtually all governmental agencies, citizens groups and even the Dade County Planning Department have convinced me that permitting of the project will not be in the

> public interest. I therefore request authority to deny the permit on the basis that the development would irretrievably commit biologically productive lands, lacks acceptability from both the public and private sector, and would not be in the public interest."

The United States District Court for the Southern District of Florida entered a summary judgment in favor of the government pursuant to its Local Rule 10(b) which permits the granting of judgment without the benefit of a hearing. The trial court refused to permit Gables by the Sea to proceed with scheduled depositions prior to the disposition of the motion for summary judgment (A-N-68) Petitioner would have established by those depositions that the Corps of Engineers did not consider the relevant factors in reaching its decision.

Petitioner prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit. The appeal was placed on the summary calendar pursuant to Local Rule 18 of the Fifth Circuit and Petitioner was thereby denied the opportunity to present oral argument. The Court of Appeals affirmed the summary judgment entered by the District Court. Thus, based on the false premise that due process and the ends of justice consist of a clear calendar and administrative efficiency, the Petitioner has been through the entire Federal administrative hierarchy, the Federal trial court level and now through the Federal appellate court level without the benefit of any hearing whatsoever and without its attorneys being permitted to make a single appearance at any hearing in any court room. The cumulative result is that Petitioner has been deprived of a substantial property right without the bene-

fit of substantive or procedural due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

It appears from the decisions of the Courts below, concerning judicial review of a denial of a requested dredge and fill permit, that as a matter of policy the Fifth Circuit will not inquire into procedural or substantive matters regarding decisions by the Army Corps of Engineers. The Fifth Circuit equates the "public interest" with a determination of whether the vocal members of the public are opposed to a project rather than objective findings based on competent evidence.

Undoubtedly, as a direct result of the failure to afford Petitioner a hearing, the denial of the requested dredge and fill permit was not based upon the prescribed legislative standards contained in the Water Quality Act, Title 33 U.S.C. §1171, et seq, as amended and reorganized in the Federal Water Pollution Control Act, Title 33 U.S.C. §1341, et seq, the National Environmental Protection Act, Title 42, U.S.C. §4322, et seq, and the applicable provisions of the Code of Federal Regulations, all of which provide that the denial of a dredge and fill permit must be based on findings that the activity if permitted would cause such extensive damage as to be contrary to the public interest because of its adverse effect on the environment. A minor impact on the environment will not, under the applicable law, justify the denial of a permit. The determination of the "public interest" is not a matter of taking a popularity poll, but rather a determination based upon competent, substantial evidence that the requested

activity will cause such extensive damage as to have an adverse impact on the environment.

The above quoted findings of the District Engineer established that there would be no substantial damage or injury to the ecology or to biologically productive areas. Such a finding requires the issuance of the requested permit. The permit was not issued because the District Engineer found "more significant however, is the lack of public acceptance of the project." It is respectfully submitted that "public acceptance" and "contrary to public interest" are two entirely different concepts. The latter is based on objective standards; whereas, the former contemplates a popularity contest and relegates a property owner's right to the whim of public clamor.[2]

The decisions below are tainted by the denial of procedural due process resulting from the cumulative effect of the failure of the United States Army Corps of Engineers to afford the Petitioner a public hearing contrary to its own regulations; the granting by the United States District Court for the Southern District of Florida of a summary final judgment in favor of the Respondents pursuant to its Local Rule 10(b), which permits the granting of a summary judgment without the benefit of a hearing before the Court; the District Court's further action in not permitting Petitioner to proceed with scheduled depositions prior to the disposition of the motion for summary judgment contrary to Rule 56 of the Federal Rules of Civil Procedure which provides that depositions will be considered by the Court in ruling on a motion for summary judgment; and by the effect of Local Rule 18 of the Court of Appeals for the Fifth Circuit which permitted this cause to be placed

[2]3 Andersons American Law of Zoning, §15.27, page 155-156.

on the summary calendar and thereby deprived Petitioner of the opportunity to present oral argument.

Title 33, U.S.C. §1344 became effective on October 18, 1972, and provided for permits for dredging and filling after notice and opportunity for public hearing. This Statute was in effect prior to November 22, 1972, when Colonel Lee, the District Engineer, prepared his report on the Petitioner's application recommending denial of the permit and prior to January 18, 1973, when final action was taken denying the permit. Yet, despite this legislative mandate requiring a hearing, none was held.

Compounding the denial of procedural due process, the District Court refused to allow Petitioner the right to take depositions of the administrative officials participating in the proceeding which resulted in the denial of the requested permit. It was an absolute necessity for the trial court to determine whether the United States Army Corps of Engineers based its decision denying the requested permit on the relevant factors. **Citizens to Preserve Overton Park, Inc. v. Volpe**, 401 U.S. 402, 91 S.Ct. 814 (1971); **Chrysler Corporation v. Department of Transportation**, 472 F.2d 659 (6th Cir. 1972). Depositions were essential for a determination of whether or not the administrative bureaucracy of the Corps of Engineers had based their decision upon consideration of the relevant factors. The purpose of taking the scheduled depositions was to establish that the administrative officials and agencies that submitted written reports had no factual predicate, either by inspection or otherwise, for their reports, and that these reports were forwarded automatically without regard or relationship to the true relevant facts concerning the effect, if any, on the environment by the granting of the requested permit. It was these unsupported reports

that gave rise to the objections relied on by the District Engineer in making his findings. The scheduled discovery was prohibited, but if permitted, would have revealed the arbitrary and capricious nature of the decision of the Corps of Engineers because of the lack of any evidence to support the decision. In fact, the District Engineer, Col. Lee, found "that the degree of ecological damage to be occasioned by the project is subject to conjecture." The United States Supreme Court held in **Citizens to Preserve Overton Park, Inc. v. Volpe, supra**, that the administrative officials who participated in an administrative decision, even in the absence of de novo review, may be required to give testimony in order to afford adequate judicial review in the United States District Court. See also **Committee for Nuclear Responsibility, Inc. v. Seaborg**, 463 F.2d 783 (D.C. Cir. 1971). In the instant cause the trial court held and the Court of Appeals affirmed that no discovery would be permitted because Petitioner was bound by the administrative record and any discovery would be irrelevant. The effect of such a ruling was to prevent judicial review and an examination of whether or not the administrative hierarchy considered the relevant factors and statutory standards.

The Circuit Court of the Second Judicial Circuit of Florida held that if the filling and dredging would injure the environment to such an extent as to adversely affect the public interest, then the State of Florida could exercise the power of eminent domain and take the property by paying the owner just compensation. Government can not, after selling submerged land to private owners for valuable consideration, deny the right to use that land in the only way in which private ownership can have any value. By denying the permit the Corps of Engineers

deprived the Petitioner of a valuable property right, that is, the use of the property. In rendering such a decision it was essential that Petitioner be afforded a full and open hearing and a fair opportunity to meet the issues and be heard before the Corps issued its final command.

The United States Supreme Court has consistently held that a party who has been deprived of property by administrative action is entitled to procedural due process in the form of notice and an opportunity to be heard. This protection found in the Fourteenth Amendment to the United States Constitution has been read broadly by this Court to include protection of any significant property interest. **Morgan v. United States,** 298 U.S. 48, 56 S.Ct. 906 (1926); **Morgan v. United States,** 304 U.S. 1, 58 S.Ct. 773 (1938); **Perry v. Sindermann,** 408 U.S. 593, 92 S.Ct. 2694 (1972); **Board of Regents of State Colleges v. Roth,** 408 U.S. 564, 92 S.Ct. 2701 (1972) and **Fuentes v. Shevin,** 407 U.S. 67, 92 S.Ct. 1983 (1972); **The United States Supreme Court in Shields v. Utah Idaho Cent.R.Co.,** 305 U.S. 177, 59 S.Ct. 160 (1938), held that the statutory requirement that a determination by the Interstate Commerce Commission as to whether or not an electric railway was subject to the Railway Labor Act could only be made after a hearing and that the reference to "hearing" intended a proceeding in which evidence is received and weighed along with argument. The Court described in that case the phrase "hearing" as follows:

> ". . . The Commission must determine 'after hearing'. The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts.' The 'hearing' is

> 'the hearing of evidence and argument'. **Morgan v. United States,** 298 U.S. 468, 480, 56 S.Ct. 906 911, 80 L.Ed. 1288. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist...." (at page 163)

In the **Fuentes v. Shevin** case, supra, this Court held that the protection of the Fourteenth Amendment includes the right and opportunity to be heard at a meaningful time and in a meaningful manner by a person who held less than absolute ownership in a physical object. This protection applies equally to a person with the right to dredge and fill his property which is useless unless he can do so.

It is indeed unfortunate that the recent enforcement of the admirable goal of protection of the environment for the present and future has resulted in administrative agencies riding roughshod over private property owners without affording them due process of law. It must be remembered that private property owners are persons within the protection of the Constitution and their rights can only be encroached upon by governmental interference if they are afforded the full protection of the Constitution and the Fourteenth Amendment. To do less would simply mean that the judicial, executive and legislative branches of the United States government have decided that the ends justify the means and the individual liberties preserved and protected by the United States Constitution have been eroded and undermined in the over zealous pursuit of an otherwise worthwhile object. The environment can and must be protected but due Process of Law can not be allowed to fall in the path of that goal.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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By: /s/ Marion E. Sibley
MARION E. SIBLEY

By: /s/ Allan M. Glaser
ALLAN M. GLASER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Reply Brief of Appellant" was mailed to EDWARD J. SHAWAKER, attorney for Appellees, Department of Justice, Washington, D.C. 20530, and to PAUL & THOMSON, attorneys for Intervenors, 1300 First National Bank Building, Miami, Florida 33131, this ____ day of September, 1974.

/s/ Allan M. Glaser

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MICHAEL RODAK, JR

In the Supreme Court of the United States

No. 74-287

GABLES BY THE SEA, INC.,
a Florida corporation,

Petitioner,

vs.

EMMETT C. LEE, JR., Colonel, U.S. ARMY CORPS OF ENGINEERS, DISTRICT ENGINEER, DEPARTMENT OF THE ARMY, JACKSONVILLE, FLORIDA DISTRICT, ROBERT F. FROEHLKE, SECRETARY OF THE ARMY, and UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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A - A

GABLES BY THE SEA, INC.,
Plaintiff-Appellant,

v.

EMMETT C. LEE. Jr., Colonel, et al.,
Defendants-Appellees.

No. 74-1028
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

July 9, 1974.

Appeal from the United States District Court for the Southern District of Florida; William O. Mehrtens, Judge.

Before GEWIN, GODBOLD and CLARK, Circuit Judges.

PER CURIAM:

In this case, Gables by the Sea, Inc., seeks reversal of the district court's order granting summary judgment to the appellees. After giving full consideration to the briefs, trial record, and the district court opinion, 365 F.Supp. 826, we discern no valid basis for reversal under the facts disclosed by the record in this case. Moreover, our recent opinion in Di Vosta Rentals, Inc. v. Lee, 488 F.2d 674 (5th Cir. 1973), demonstrates to us that appellant's contentions are without merit. Accordingly, the judgment of the district court is affirmed.

*Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5th Cir. 1970, 431 F.2d 409, Part I.

A - B

[TITLE OMITTED]

ON PETITION FOR REHEARING

(Filed August 2, 1974)

Before GEWIN, GODBOLD and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

A - C

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA

Case No. 73-752-Civ-WM

GABLES BY THE SEA, INC.,
a Florida corporation,

Plaintiff,

vs.

EMMETT C. LEE, JR., etc., et al.,

Defendants.

ORDER GRANTING SUMMARY FINAL JUDGMENT FOR DEFENDANT

This cause came on to be heard upon the motion of the defendants for summary judgment, pursuant to Rule 56, Federal Rules of Civil Procedure, and counsel having submitted memoranda of law in support of their respective positions, and the Court having considered the record, most particularly the administrative record filed by defendants in support of their motion for summary judgment, and the Court being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED

1. That the motion of the defendants for summary judgment be, and the same is, hereby granted.

2. That the plaintiff shall take nothing by this action and summary final judgment is hereby entered in favor of the defendants and against the plaintiff, and the defendants shall go hence without day .

DONE AND ORDERED in chambers at Miami, Dade County, Florida, this 23rd day of October, 1973.

/s/ W. O. Mehrtens

UNITED STATES DISTRICT JUDGE

cc: Marion E. Sibley, Esq.
United States Attorney (Reynolds)
James R. Walpole, Esq.

A - D

[TITLE OMITTED]

MEMORANDUM OPINION

This suit, brought against the United States and certain named individuals is, in essence, a challenge of the administrative determination made by the Corps of Engineers to deny the plaintiff's application for a "dredge and fill permit" pursuant to 33 U.S.C. 403. A brief account of the facts alleged in the Complaint will precede a discussion of the legal issues.

In 1956 the Corps of Engineers issued a dredge and fill permit to Gables Venetian Waterway, Inc., predecessor in title to plaintiff in the instant action. The permit authorized dredging and filling operations on the western shore of Biscayne Bay, a navigable water of the United States. By its terms, the permit had an expiration date of December 31, 1959. Several revisions in the application were made and extensions of the permit granted from 1959 through 1965. In the fall of 1965 plaintiff again requested an extension of the permit, in order to complete the work, to December 31, 1968. The Corps granted this extension. No further requests were made for [310] extensions prior to the expiration date and plaintiff's permit expired December 31, 1968.

Approximately four years later[1] on July 28, 1972, a representative of Gables submitted a permit application

[1]Apparently after the Corps granted the permit extension to December 31, 1968, Gables was involved in a series of litigation in the Florida state courts involving the issuance of certain State permits and certification. The State court litigation has no effect on the instant case.

to the Corps seeking to conduct dredge and fill activities in the same vicinity of the prior dredge and fill operations. Pursuant to its standard procedures, the Corps issued a public notice of the application. The Corps then received over 500 comments, including reports from State and Federal agencies, in opposition to the proposed project. In response to such adverse comments, Gables submitted a technical report to the Corps attempting to show that the permit should be issued. On January 18, 1973, the Corps denied the application.

Shortly thereafter Gables filed the instant case seeking to have the Corps issue the permit. The Government filed a motion to dismiss which was denied. A motion to intervene on behalf of the defendants was filed by the Tropical Audubon Society, Inc., the National Audubon Society, Inc. and the Florida Audubon Society. This Court denied the motion to intervene. The Government then filed a motion for summary judgment upon which I will now rule.

[311] SUMMARY JUDGMENT

The procedural aspect of the defendants' motion for summary judgment should be considered before reaching the substantive issues presented in such motion.

The Federal Rules of Civil Procedure provide that a judgment should be rendered if the pleadings and other papers filed show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), F.R.C.P. See Natural Screen Service v. Poster Exchange, 305 F.2d 647 (C.A. 5, 1962). Defendants have filed a motion for sum-

mary judgment and have attached to it the entire administrative record (in excess of 600 pages) upon which the Corps of Engineers based its decision to deny the plaintiff's permit along with two affidavits indicating that the Corps' decision was based on the record. Defendants take the position that there is no genuine issue as to any material fact other than those established in the pleadings and the attached papers. This Court has carefully reviewed the papers filed in the case and, in spite of the plaintiff's opposition, is persuaded that there is no genuine issue as to any material fact in the instant case. I now turn to the question of whether the defendants are entitled to judgment as a matter of law.

DECISION OF THE CORPS OF ENGINEERS

The Complaint, after describing various State court proceedings which involved the plaintiff, alleges that the defendants did not conduct an adversary hearing and "that there was no substantial evidence to support the judgment of [312] the district engineer in denying plaintiff's application for an extension of its permit, and said judgment is arbitrary, capricious and without sufficient support in the record before the District Engineer." (Complaint, paragraph 12) These items will be discussed individually in determining whether or not defendants are entitled to summary judgment.

1. Adversary Hearing. Plaintiff takes the position that it is entitled to an adversary hearing prior to a determination by the Corps on its permit application if for no other reason than for the Corps to consider the issue of the "public interest" of the project. Defendants on the other hand argue that the plaintiff may have requested,

and had the opportunity for, a public hearing but this opportunity was waived since no hearing was ever requested. The question this Court must decide is whether the plaintiff is entitled as a matter of right to a public hearing. In making this determination I look first to the statute which authorizes the defendants to issue permits for dredge and fill activities—Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403. This section makes it unlawful to, inter alia, excavate, fill or alter the course, condition or capacity of the channel of any navigable water "unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 333 U.S.C. 403.[2] The statute then clearly provides the Secretary of the Army with [313] the authority to issue permits to conduct dredge and fill operations but it nowhere provides that any type of hearing must be held prior to the issuance of such permits. In examining the issue of whether or not this Act requires a hearing, the Court in Sisselman v. Smith, 432 F.2d 750, 754 (C.A. 3, 1970), found:

> "The Rivers and Harbors Appropriations Act of 1899 . . . may be searched in vain for any language indicating the need for an adversary hearing before the authority contained therein may be exercised. . . ."

The Rivers and Harbors Act nowhere requires that a hearing be held prior to the issuance of a permit. Further, the issuance or denial of such is not contingent on adversary proceedings, although such proceedings are clearly

[2]Section 12 of the Act, 33 U.S.C. 406, provides for criminal penalties up to $2500 for each violation and for the removal of any unlawful structures.

not prohibited by the Act. In examining the regulations of the Corps of Engineers I find that the applicant is provided with an adequate opportunity to present any information or evidence upon which it wishes to support the application or to rebut objections to the application. See 33 C.F.R. §202.120(f). In the instant case the plaintiff never requested the Corps to conduct a hearing. While the Corps was considering its application, plaintiff submitted a technical report rebutting certain of the adverse comments and reports submitted to the Corps. The plaintiff was free to request a hearing at that point or to present the Corps with any further information or reports that it felt appropriate. I find that since the plaintiff had its opportunity to request a hearing and elected not to do so, it may not challenge denial of the permit on the basis that it did not receive a hearing.

[314] 2. Scope of Review. In order to determine whether or not the decision of the Corps of Engineers to deny the permit was proper, it is first necessary to establish the proper scope of judicial review. Plaintiff has sought to conduct extensive discovery procedures, presumably to determine whether the Corps properly denied the application. Defendants have opposed the discovery procedures on the basis that this action is a challenge, pursuant to the Administrative Procedure Act, 5 U.S.C. 701 et seq., to a final agency decision of the Corps and as such should be reviewed only on the administrative record. I find the position of the defendants to be proper.

The plaintiff seeks to review a final administrative decision of the Corps of Engineers; the Complaint alleges jurisdiction under the Administrative Procedure Act. It is well established that the extent of judicial review of an

administrative decision is determined by the statute upon which the decision is based. In the absence of statutory authorization, review of an administrative decision is based upon the administrative record of the particular agency. This was recently affirmed by the Supreme Court in Camp v. Pitts, ____ U.S. ____, 93 S.Ct. 1241, 1244 (1973):

> "The appropriate standard for review was accordingly whether the comptroller's adjudication was 'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. §706(2)(A)."
>
> "In applying that standard the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."
>
> * * *
>
> "The validity of the comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review."

[315] The Supreme Court also dealt with this issue in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971):

> "Thus it is necessary to remand this case to the district court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision."

Judicial review, then, must be centered[3] around the contents of the administrative record. Information extraneous to the record should not be considered in the review procedure. If the agency action is found to be improper, the matter would be remanded to the agency; it would be improper to conduct de novo proceedings in the form of a trial by the district court to consider extra-record information.

I find that the scope of review in the instant case is limited to the administrative record upon which the Corps of Engineers made its decision.

3. Arbitrary, Capricious, and Abuse of Discretion Or Not in Accordance with Law.

Plaintiff urges that the denial of its permit by the Corps was arbitrary and capricious and further alleges that the District Engineer found that the project would cause no harmful effect to the navigable waters of Biscayne Bay. (Complaint, paragraph 13) Defendants on the other hand deny such allegations and assert that the decision of the Corps was proper and that the [316] administrative record supports this position. The record contains over 500 adverse comments on the project including those from the United States Environmental Protection Agency, the Department of Interior, the Metropolitan Dade County Planning Department, the Florida Audubon Society and the National Audubon Society as well as reports from the Department of Interior, Bureau of Sport Fisheries and Wildlife and the Florida Game and Fresh Water Fish

[3]The Court may also consider the inherent expertise of the agency making the decision. City of Chicago v. F.P.C., 458 F.2d 731, 746 (C.A. D.C. 1971).

Commission. Hundreds of interested citizens, including at least one United States Senator and two Congressmen, submitted comments opposing the project. Less than five comments were received in favor of the project. Also included in the record is a twenty-six page technical report submitted by the plaintiff which discusses and rebuts certain of the adverse comments. The Department of Interior, Bureau of Sport Fisheries and Wildlife, in its report to the Corps, stated:

> "The project, as proposed, will result in a significant destruction in degradation of the marine resources of South Biscayne Bay. Approximately 128 acres red mangroves and 50 acres of open shallow water will be lost as the result of the proposed filling. In addition, 240 acres of bay bottom will be altered or disturbed as the result of the proposed dredging operation. Areas previously dredged in accordance with the original permit are over 10 feet deep, receive little or no light penetration, contain large deposits of silt, and have not revegetated. It is obvious that revegetation cannot be anticipated in the proposed dredge area."

The Florida Fresh Water and Fish Commision stated in its report to the Corps:

[317] "The proposed project's finger fill system will contribute to increased urban runoff which in conjunction with the excessively deep canals will contribute to eutrophication of adjacent waters. . . ."

> "This project will completely obliterate or degrade more than three hundred and fifty acres of biologically productive submerged land and title swamp, thus eliminating a significant portion of the Biscayne Bay ecosystem, its food webs and wildlife habitat. . . ."

The Department of Interior, Office of the Secretary stated in its letter to the Corps:

> ". . . The dredging proposed would permanently disrupt these [complex and valuable biological] communities in both the area to be filled and the area dredged to obtain the fill material. Perhaps of greater importance would be the damage caused by siltation and turbidity resulting from the dreging operation. . . ."

In order to upset the final agency decision, there must be a clear showing that such decision was improper. The burden of proving that the action was improper is on the party challenging the decision. It is well settled that there is a definite presumption of regularity in favor of the administrative decision. FCC v. Schreiber, 381 U.S. 279 (1965); Chaney v. United States, 406 F.2d 809 (C.A. 5, 1969), cert. den. 396 U.S. 867. In reviewing this action this Court may determine only whether the agency acted properly and it must not "substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 301 U.S. 402, 416 (1971). After reviewing the administrative record, which I find adequate for the purposes of judicial review, this Court is of the opinion and finds that the Corps' decision was proper, was not arbitrary, capricious, was not an abuse of discretion and in

accordance with law. I find [318] that the decision was based on a consideration of the relevant factors; that there was no "clear error of judgment", Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); and that the Corps' action in denying the permit was a "reasoned decision", International Harvester v. Ruckelshaus, 478 F.2d 615, 648 (C.A. D.C. 1973). See also Essex Chemical Corporation et al. v. Ruckelshaus, No. 72-1079, C.A. D.C., decided September 10, 1973, slip opinion pages 12, 18, 19 and 25.

4. Sufficiency of Fact Finding. Plaintiff contends that the decision of the Corps is not supported by the record. This is, in effect, an attack on the sufficiency of the fact finding procedures of the administrative agency. However, nowhere does the plaintiff clearly establish any defect in the procedures or the establishment of the administrative record.[4] The procedures of the Corps of giving public notice of the permit application, accepting written comments, providing the applicant with copies of comments and by allowing the applicant to rebut comments, are not on their face inadequate procedures in the administrative process. In the instant case these procedures, as evidenced by the record, were properly and adequately carried out by the Corps.

Plaintiff also contends that there "was no substantial evidence" to support the decision of the Corps of Engineers. This argument is not relevant to the Corps' fact finding procedures since the substantial evidence test need only be utilized in an [319] adjudicatory or formal rule

[4]Plaintiff does assert that no adversary hearing was conducted, but it never asserts that this resulted in faulty fact finding by the Corps.

making procedure. It is not involved in the type of decision making process involved in the instant case. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414, 417 (1971); Camp v. Pitts, —— U.S. ——, 93 S.Ct. 1241 (1973); Delaware Citizens for Clear Air, Inc. v. Ruckelshaus, 480 F.2d 972 (C.A. 3, 1973).

I find the Corps' fact finding procedures to be adequate, based upon substantial evidence, and that they were adequately carried out in the instant situation.

CONCLUSION

Having considered the pleadings and papers, including the administrative record, in this matter, I find that there are no genuine issues of material fact and that the defendants are entitled to summary judgment as a matter of law. The administrative determination of the Corps of Engineers in denying the plaintiff's application for a permit pursuant to 33 U.S.C. 403 is upheld and the relief sought by the plaintiff is denied.

DONE and ORDERED at Miami, Florida, this 15th day of October, 1973.

/s/ W. O. Mehrtens

United States District Judge

[320] copies to:

Robert W. Rust, U.S. Attorney
By: Robert Reynolds, Asst. U. S. Attorney
300 Ainsley Bldg., Miami, Fla. 33132

James R. Walpole, Attorney, Dept. of Justice
Washington, D.C. 20530

Sibley, Giblin, Levenson & Ward
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Miami Beach, Fla. 33139

Stuart Simon, Esq.,
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Miami, Fla. 33130

Paul & Thomson
By: Parker D. Thomson, Esq.
1300 First National Bank Bldg.,
Miami, Fla. 33131

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[65]

DEPARTMENT OF THE ARMY
Jacksonville District, Corps of Engineers
P. O. Box 4970
Jacksonville, Florida 32201

SAJSC Permits (56-188) 18 January 1973

Mr. Edmund Friedman
Connell Associates, Inc.
P. O. Box 677
Miami, Florida 33135

Dear Mr. Friedman:

This is in reference to your letter of 28 July 1972 submitting an application in behalf of Gables-By-The-Sea, Inc., to modify and extend a Department of the Army permit originally issued 18 June 1956 to dredge and fill in certain areas along the westerly shore of Biscayne Bay at Coral Gables, Florida.

Your application was given careful and thorough consideration by all levels of the Department of the Army prior to final action in the matter.

The final findings and conclusions of the Army, based on all available evidence, are that issuance of the requested permit:

1. Is not believed to be consistent with current public interest in the preservation of man's natural environment as enunciated in Public Law 91-190,

2. Would destroy a biologically productive area in Biscayne Bay, and

3. Is opposed by the Bureau of Sport Fisheries and Wildlife of the Department of the Interior, the Environmental Protection Agency, the State of Florida Game and Fresh Water Fish Commission and Department of Natural Resources, the Dade County Planning Department, and was the subject of over 500 letters of opposition from the general public.

In view of the above, we have concluded that the proposed work would not be in the public interest and regret that we must inform you that the request for modification and extension to Department of the Army permit 56-188 is hereby denied.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

/s/ EMMETT C. LEE, JR.

Colonel, Corps of Engineers
District Engineer

[19]

DEPARTMENT OF THE ARMY
Jacksonville District, Corps of Engineers
P. O. Box 4970
Jacksonville, Florida 32201

SAJSC Permits (56-188) 22 November 1972

SUBJECT: Report on Application to Modify Department of the Army Permit to Dredge and Fill in Biscayne Bay

THRU: Division Engineer, South Atlantic
ATTN: SADKO

TO: HQDA (DAEN-CWO-N)
WASH DC 20314

1. Name of applicant: Gables By the Sea, Inc., c/o Connell Associates, Inc., P.O. Box 677, Miami, Florida 33135.

2. Location of work: westerly shore of Lower Biscayne Bay, south of the mouth of Snapper Creek Canal and north of Shoal Point, Sections 17 and 18, Township 55 S., Range 41 E., City of Coral Gables, Dade County, Florida.

3. Estate and other primary authority: The applicant has necessary estate rights.

4. Character of proposed work: It is proposed to dredge approximately 1,300,000 cubic yards of material

from Lower Biscayne Bay to a depth of -13.0 mean sea level (approximately 55 acres) and upland canals. Material would consist of some sand, mud, and oolitic limestone. Retaining mounds would be constructed to inclose and contain the dredged materials. Weirs would be used at the easterly edge of the proposed fill. See report submitted by Dr. Howard J. Teas which gives in detail the proposed work and his opinion of the effect of the work on the environment (Incl 11).

5. Views of local and State authority: The State Department of Pollution Control issued a letter of certification on 15 May 1972 as a result of a court order but stated that they had not reviewed and analyzed the project, and consequently did not know whether or not there would be reasonable assurance that the project would not violate applicable water quality standards of the State of Florida. The Trustees of the Internal Improvement Trust Fund withheld comment on the Corps' public notice since they were [20] under a court order to grant a State permit. See letter dated 12 September 1972 (Incl 7). The Game and Fresh Water Fish Commission of the State of Florida objected to the proposed work in letter dated 18 September 1972 (Incl 7). By letter of 22 September 1972 Metropolitan Dade County requested the permit be denied (Incl 8).

6. Date for sending information to other interested parties and summary of objections offered: A public notice was issued 17 August 1972 (see Inclosures 2 and 3). Approximately 515 objections were received. This opposition is discussed in a subsequent paragraph and reflected in Inclosure 9. Two letters in favor of the project were received (Incl 10).

7. Views of District Engineer concerning probable effect on:

a. Navigation: There would be no unreasonable obstruction to navigation.

b. Harbor lines: Not applicable.

c. Flood heights and drift: Not applicable.

d. Beach erosion and accretion: Not applicable.

e. Fish and wildlife: The U. S. Bureau of Sport Fisheries and Wildlife recommended the permit be denied. The work was also opposed by Florida State Game and Fresh Water Fish Commission and the State Department of Natural Resources.

f. Pollution: Similarly, the Environmental Protection Agency in letter dated 12 October 1972 recommended the permit be denied. As previously stated, the State Department of Pollution Control issued letter of certification as a result of a court order.

g. Esthetics: During the period of construction, the proposed work would be esthetically objectionable but upon completion should present an attractive waterfront development.

h. Ecology: The opposition of the Federal and State agencies and the general public is based, to a large extent, on the loss of an ecologically valuable area.

i. Oceanography: Not applicable.

j. Public Interest: The reaction of the public notice makes it clear that granting the permit would not be consistent with the public interest.

[21] 8. Other pertinent remarks:

a. On 18 June 1956, the District Engineer issued a Department of the Army permit to the applicant to dredge and fill, the dredged material to be contained by adequate dikes, modified and extended 5 December 1957, extended 4 December 1959, revised 6 July 1960 and extended 12 November 1965. No protests were received. The present application is to revive, modify and extend this permit. (See Inclosure 1).

b. The application has been the subject of widespread public interest. Over 515 responses were received to our public notice of which all but two were in opposition. See Inclosure 9 as a representative sample of this opposition; the remaining are in our files as a matter of record but are not transmitted because of the great bulk involved.

c. There were many requests received for a public hearing, including requests from Senator Chiles and Congressmen Pepper and Fascell. However, it was my conclusion that a hearing would only serve to further delay a final decision as it was felt that sufficient response was received on the public notice to adequately reflect the public interest in the proposal.

d. The Fish and Wildlife Service and EPA recommended that the permit be denied. (See Inclosures 5 and 6).

e. The recognized conservation groups are also unanimously opposed to the work as proposed. (Included in Inclosure 9).

f. Inclosure 12 was received from the applicant in response to objections made by Environmental Protection Agency, Department of the Interior, Metropolitan Dade County and Florida Game and Fresh Water Fish Commission.

9. Conclusions and recommendations: Based on an evaluation of the comments by both the developer and state and federal agencies competent to make an evaluation of ecological factors incident to the proposed development, it is my conclusion that the degree of ecological damage to be occasioned by the project is subject to conjecture. There will however be some irreversible commitment of biologically productive areas resulting in ecological damage of one degree or another. More significant however is the lack of public acceptance of the project. Opposition to the project by virtually all governmental agencies, citizens groups and even the Dade County Planning Department have convinced me that permitting of the project will not be in the public interest. I therefore request authority to deny the permit on the basis that the development would irretrievably commit biologically productive lands, lacks acceptability from both the public and private sector, and would not be in the public interest.

/s/ Emmett C. Lee, Jr.

EMMETT C. LEE, JR.
Colonel, Corps of Engineers
District Engineer

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[17]

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CIVIL ACTION NO. 69-984

GABLES BY THE SEA, INC.,
a Florida corporation,

Plaintiff,

vs.

CLAUDE R. KIRK, JR., Governor of the State of Florida; TOM ADAMS, Secretary of State of the State of Florida; EARL FAIRCLOTH, Attorney General of the State of Florida; FRED O. DICKINSON, JR., Comptroller of the State of Florida; BROWARD WILLIAMS, Treasurer of the State of Florida; FLOYD T. CHRISTIAN, Superintendent of Public Instruction of the State of Florida; DOYLE CONNER, Commissioner of Agriculture of the State of Florida, and their successors in office, as the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Defendants.

FINAL JUDGMENT

The issues between the parties require the determination of the rights of plaintiff to dredge fill material from the public waters of Biscayne Bay and use it to fill

certain bottoms owned by plaintiff. The facts are rather involved and can best be evaluated if stated chronologically. Plaintiff is the successor in title to other parties with respect to some of the rights now asserted but, for the purpose of simplicity, the word 'plaintiff" will be used to describe both plaintiff and its predecessors in title.

On January 6, 1936, plaintiff acquired by purchase from the Trustees of the Internal Improvement Fund a substantial tract of bottoms in Biscayne Bay and within the City of Coral Gables. This tract extended seaward to the then established bulkhead line.

[18] Some time after the purchase of these bottoms, the bulkhead line was reestablished some distance seaward from its previous location.

In 1956 plaintiff began to seek the necessary permits to dredge from the adjacent public bottoms and fill its land. Under date of May 17, 1956, the Trustees agreed to the issuance by the U. S. Corps of Engineers of a permit for this dredging. Everyone concerned seems to have regarded this as, at least, a license to plaintiff to remove the fill from the public bottoms.

During 1957 plaintiff sought to acquire by purchase from the Trustees a parcel of bottoms consisting of the area between the bulkhead line as it had previously existed and the new bulkhead line which had been established somewhat seaward from the old line.

In the course of these negotiations several letters were written on behalf of the Trustees which are pertinent to the present inquiry.

On March 5, 1957, W. Turner Wallis, engineer for the Trustees wrote:

> "The present policy of the Trustees, applicable to Dade and Palm Beach Counties, is limited to arrangements under which material may be used by the upland owner for filling the adjoining submerged land. The application to purchase the desired quantity of material should be accompanied by a suitable map showing both the area to be filled and the area and depth limits of proposed excavation.
>
> "Upon payment of the appraised value for the filled area (prior to filling) and the completion of such work, the Trustees will issue a disclaimer of title."

Plaintiff filed a formal application with the Trustees, accompanied by a map which indicated the bottoms to be acquired, [19] the areas to be filled and areas from which the proposed fill was to be dredged. This map clearly indicates that the area to be filled embraced the parcel previously acquired and the proposed new acquisition.

Under date of September 6, 1957, Van H. Ferguson, Director, wrote:

> "The grant of the deeds to the submerged lands includes approval for dredging the area indicated for this purpose on the map which accompanied the applications."

Other correspondence is of similar tenor.

Under date of September 25, 1957, in the light of this background plaintiff purchased and paid for the second parcel of bottoms — that lying between the old and the new bulkhead lines.

Plaintiff asserts the right to dredge from public bottoms to fill its now privately-owned submerged land on two theories: (1) the right to the unexpired portion of a dredging permit which, it alleges, defendants illegally revoked, and (2) a legal right to a new permit.

Without discussing all the voluminous documents filed before the Court or the transcript of testimony, it is sufficient at this time to point out the following:

It is alleged by the plaintiff and admitted by the defendant that prior to October 18, 1965 the City of Coral Gables approved a fill permit to plaintiff and on November 2, 1965 this permit was formally approved by the Trustees. It is also admitted that this permit was extended until December 31, 1968. See Paragraph VIII of Complaint and Page 2 of Answer.

The extension of the fill permit took the form of an approval by the Trustees of an extension of a permit issued [20] by the Corps of Engineers.

The defendants now argue that this was not a valid extension because it was for a period longer than two years and they say the Trustees are bound by the requirement of Section 253.124, Florida Statutes (as it then existed) that no construction permit shall be issued unless the proposed work is to be completed within two years next after the date of the issuance of such permit.

Laying aside the question of the possible estoppel of the Trustees to now assert their own wrong in approving a three-year extension of plaintiff's dredging rights, it is apparent that the statute places no limit upon the length of an extension of a dredging permit. It provides "Such time may be extended for good cause, upon showing that all due effort and diligence toward completion of said work have been made." In the absence of proof to the contrary the Court must assume that the necessary showing was made or this permit would not have been extended.

On May 21, 1968 the Trustees adopted a resolution prohibiting any person from thereafter dredging pursuant to any pre-existing permit unless dredging operations had already commenced. Plaintiff respected this resolution and, not having begun dredging, did not thereafter attempt to dredge under its permit.

As regards this permit the Court holds:

1. The right of plaintiff under the circumstances of this case to dredge fill material for public bottoms to fill the submerged land purchased from the Trustees was an incident to the purchase of submerged land and became a vested right.

2. This right did not extend in perpetuam and would be lost if not exercised within a reasonable time.

3. A reasonable time does not extend beyond the expiration date of the last extension granted by the Trustees.

[21] 4. The granting of dredge and fill permits by the Trustees served to perpetuate the rights of plaintiff for the life of such permits.

5. The action of the Trustees in attempting to abrogate an extension of a fill permit previously granted was without lawful authority, and void.

6. Plaintiff should not be penalized for obeying the demands of the highest officers of the State and respecting the order not to dredge.

7. Plaintiff is entitled to dredge from the designated areas under the terms and conditions of its permit in effect on May 21, 1968 for a number of days after this judgment becomes final, and the time for appeal expires, equal to the number of days from the adoption of the above-described resolution of the Trustees to December 31, 1968.

After the Trustees had attempted to abrogate the then current permit plaintiff applied to the City Commission of Coral Gables for a new permit. A hearing was had and this permit was granted by the City Commissioners. It was then transmitted to the Trustees for their approval. After several rather stormy sessions the Trustees disapproved the permit.

As regards this action of the Trustees, plaintiff raises three questions. It contends: (1) the Trustees were limited to "formal" approval of the permit granted by the City, and since the permit was in proper form and had been

issued after all statutory formalities had been observed, the Trustees had no discretion and should have approved the permit; (2) that the Trustees acted arbitrarily and capriciously in disapproving the action of the City of Coral Gables in approving the permit, and (3) that the Trustees illegally and in violation of plaintiff's rights received additional evidence at a subsequent meeting when plaintiff was not represented after the taking of evidence had been closed. These contentions require separate consideration.

Prior to the Legislative session of 1967, the statutes vested in local officials the power to determine discretionary [22] matters relating to the issuance of dredge and fill permits. The power of the Trustees was limited to formal approval — that is, approval of the procedure followed in the issuance of the permits. Chapter 253, Florida Statutes, 1965. Trustees v. Venetian Isles Development Corp., 166 So.2d 765. Burns v. Wiseheart, 205 So.2d 708.

Chapter 253 was amended in 1967. This amendment purports to vest broad powers in the Trustees to disapprove permits authorized by cities and counties. Plaintiff contends that the amendment is invalid because it provides that "The Trustees shall consider any other factors affecting the public interest". This language, plaintiff argues, is so broad as to constitute a delegation of legislative powers to the Trustees in violation of the well-established rule which requires reasonable guidelines regulating the exercise of discretion by executive officers in matters affecting the rights of the people. If the quoted language were all the change in the law, this argument would require most careful consideration. However,

Section 253.124(2) as it stands after the 1967 amendment, provides for the granting of fill permits by local officers only after the consideration of specifically enumerated matters and then provides that the Trustees shall have power to "approve, reject or issue" the permit.

The most casual reading of the matters required to be considered reveals that they include things of general public interest to the people of the State, as well as the local interests of the inhabitants of the cities and counties in which the proposed dredging and filling will occur. It would be an undue restriction of the plain language of the statute to hold that the Trustees, in approving or rejecting an application, should not exercise their independent judgment in regard to the [23] enumerated matters required to be considered.[1] The Trustees do not sit merely as an appellate tribunal to review the action of the local authorities. They exercise for the general public of the State the same original powers which local authorities exercise with respect to local interests.

Even should it be determined that the sentence "The Trustees shall also consider any other factors affecting the public intent" is invalid, that would not affect the remainder of the amendatory statute and the authority of the Trustees to exercise independent judgment in regard to the matters specifically enumerated in the statute would remain.

It is next contended that the Trustees acted arbitrarily and capriciously in refusing to approve the dredge and fill permit authorized by the City of Coral Gables.

[1]It would appear that the amendment of the statute was for the purpose of changing the law announced in the Venetian Isles and Wiseheart cases.

In support of this position, plaintiff relies largely upon the case of Zabel v. Pinellas County Water and Navigation Control Authority, 171 So.2d 376.

A dredge and fill permit contemplates two things — the taking of fill material from one place and depositing that fill material in another. As applied to the situation presently before the Court, the rights of the plaintiff are entirely different with respect to the two operations. The place from which the material is sought to be dredged is public property held by the Trustees for the benefit of the public. On the other hand the place where the plaintiff desires to deposit this fill material is private property owned by plaintiff by purchase from the Trustees. To the extent, if any, that action of the Trustees in refusing the requested permit is [24] motivated by a desire to prevent the reasonable development by filling of plaintiff's privately owned bottoms the action of the Trustees is arbitrary, capricious and without sufficient support in the record before the Trustees or the record before this Court. See Zabel v. Pinellas County Water and Navigation Control Authority, 171 So. 2d 376. DiVosta Rentals, Inc. v. Kirk, Leon County No. 69-1219.

As regards the removal of fill from public bottoms for the purpose of filling these privately owned bottoms an entirely different situation is presented.

As has been heretofore observed, the plaintiff has acquired a right to fill its land by dredging from public bottoms as an incident to its original purchase. But the right to dredge from public bottoms was not included in the deed or conveyed by express grant. It was in the nature of an implied agreement on the part of the Trustees

as an incident to the purchase by plaintiff, enforceable more by equitable estoppel than the protection of any title acquired by any conveyance by the Trustees of an interest in the public bottoms from which the fill was to be removed. It would be quite unreasonable to infer from the circumstances of the conveyance to plaintiff that it was not the intention of the parties that plaintiff would have the right to dredge for public bottoms for the purpose of filling those submerged lands. It would be equally unreasonable to infer from these circumstances any intent that this right to dredge was intended to exist for all time to come. The only logical conclusion is that the right to dredge should exist for a reasonable time. Plaintiff has lost by inaction any legal right to a permit to dredge from public bottoms to fill the land in question, arising from or as an incident to its purchase of the [25] bottoms it now desires to fill beyond the time agreed to by the Trustees.

The present granting of any dredge permit authorizing plaintiff to obtain material from public bottoms to fill its submerged land would be a matter of grace on the part of the public. However, statutes may be enacted which permit citizens to qualify for public grants and when the terms of a valid statute are fully met, it is the legal duty of public officials to execute such grants. If plaintiff has fully met the requirements of a valid statute or if the Trustees, in denying it a permit, have not accorded plaintiff all its legal rights, it is the duty of the Court to grant appropriate relief.

In this case the Court finds that the Trustees considered plaintiff's application for a dredge and fill permit after affording plaintiff a hearing, and upon the basis

of the evidence before them denied this permit. To the extent that this decision constituted a denial of the right of plaintiff to fill submerged land owned by it, the action of the Trustees was not justified by the evidence before them and was legally arbitrary and capricious. To the extent that this decision of the Trustees constituted a denial of a permit authorizing plaintiff to dredge material from public bottoms for the purpose of filling its privately owned submerged land the action of the Trustees was within the scope of their statutory powers. Since the permit applied for was for both dredging and filling it was lawfully denied in that form. It would be the legal duty of the Trustees to issue a permit to plaintiff to fill its submerged land by the use of suitable material from other sources.

If such filling would injure the aquatic life of the vicinity to such an extent as to adversely affect the public [26] interest, the State has the power of eminent domain to take, for just compensation, the plaintiff's property. But the State cannot, after selling submerged land to private owners, deny such owners the right to use those lands in the only way in which private ownership can be of any value.

Finally, plaintiff complains that the Trustees denied it due process of law by taking evidence at a meeting of the Trustees at which plaintiff was not represented. The record shows that, acting rather informally, the Trustees had received evidence and argument for and against the granting of the permit and on July 29, 1969 took the matter "under advisement."

On August 5th a representative of the Trustees wrote plaintiff's attorney:

> "This will acknowledge receipt of depositions, documents and other exhibits submitted to the Board of Trustees of the Internal Improvement Trust Fund in regular meeting on July 29, 1969.
>
> "For your information we enclose an unofficial copy of the Trustees' minutes relative to your appearance before the Board.
>
> "After the Trustees have had an opportunity to properly review your exhibits, we shall be pleased to hear from you as to what date you may desire this matter to be placed before the Trustees for consideration."

Plaintiff's attorney replied:

> "With reference to your letter of August 5, 1969, please be advised that the evidence in this matter has been submitted to the Board at a regular meeting held on July 29, 1969 and the Board is now considering the case.
>
> "We have no objections to the Board voting on this matter at its meeting on August 19, 1969.
>
> "Please advise us of the result of such vote."

The representative of the Trustees then wrote plaintiff's attorney:

[27] "Your letter of August 7 indicating that you would have no objection to this matter coming before the Trustees on August 19, 1969, is hereby acknowledged.

"We will advise the Attorney General of your position and will await his directive."

Plaintiff's attorney selected a date for the Trustees to act on this application. In doing so he had no authority to limit the scope of the action of the Trustees to simply voting to approve or disapprove the permit. He had no right to assume that the Trustees would not at that time reopen the taking of evidence. While it would have been a courtesy to plaintiff's attorney to inform him in advance that more evidence would be offered, failure to give such notice does not deny due process of law. Plaintiff was on notice that the Trustees would take action on the application on a date chosen by plaintiff's attorney. That is sufficient.

It is therefore, ADJUDGED:

1. The plaintiff has the lawful right to dredge material from the areas indicated on the application for a dredge and fill permit and to use such material to fill its privately owned submerged land indicated on such application for a period of time consisting of 223 days beginning on the day this judgment becomes final by the expiration of the time of appeal, or the filing of the mandate of an Appellate Court affirming this Judgment, whichever is the later date.

2. Plaintiff has not shown a legal right to a permit to dredge from public bottoms in excess of the rights outlined in paragraph 1 supra.

3. Upon proper application it would be the legal duty of the Trustees to grant plaintiff a permit to fill its privately owned submerged land, purchased from the Trustees, by use of materials from other sources.

DONE at Tallahassee, Florida, this 10 day of September, A.D. 1970.

/s/ Hugh M. Taylor

A - H

[41]

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JULY TERM, A.D. 1971.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

CASE NO. 0-167.

CLAUDE R. KIRK, JR., Governor of the State of Florida, et al.,

Appellants,

vs.

GABLES BY THE SEA, INC., a Florida corporation,

Appellee.

Opinion filed August 31, 1971.

An Appeal from the Circuit Court for Leon County. Hugh M. Taylor, Judge.

Philip S. Bennett and Herbert D. Sikes, for Appellants.

Sibley, Giblin, Levenson & Ward; and Gerald T. Wetherington, for Appellee.

JOHNSON, J.

This is an appeal by the Trustees of the Internal Improvement Trust Fund of a judgment rendered by the Circuit Court of Leon County, Florida, on the 10th day of September, 1970, in a cause brought by the Appellee, Gables By The Sea, Inc., a Florida corporation, against the Trustees. The judgment of the lower court adjudicated that Gables By The Sea was entitled to dredge from a certain designated area in Biscayne Bay to procure material to fill the corporation's swamp and overflow land it had purchased from the Trustees.

142] The crux of the complaint filed by the plaintiff-appellee herein, was to obtain quashal of an order or ruling of the Trustees of the Improvement Trust Fund and a declaratory decree.

At the time the corporation entered into negotiations with the Trustees for the purchase of the land in question, it was agreed that the Trustees would agree to sell the fill material required and that the payment would be made for the material on the basis of appraised price of the land to be filled; and that the purchase price of $480.00 per acre (plus the advertising costs) will in addition to paying for the acquisition of the bay bottom land, also include the necessary fill from the bay bottom in front of the property in sufficient quantity to fill the acquired land to grade. Thereafter the corporation paid for the land, which included the appraised value of the fill material.

The trial court held an extended hearing and thereafter entered its final judgment, in which the judge cited some ten pages of findings and reasons upon which to premise his judgment. The adjudicative portion of the Order was as follows:

"It is, therefore, ADJUDGED:

"1. The plaintiff has the lawful right to dredge material from the areas indicated on the application for a dredge and fill permit and to use such material to fill its privately owned submerged land indicated on such application for a period of time consisting of 223 days beginning on the day this judgment becomes final by the expiration of the time of appeal, or the filing of the mandate of an Appellate Court affirming this judgment, whichever is the later date.

"2. Plaintiff has not shown a legal right to a permit to dredge from public bottoms in excess of the rights outlined in paragraph 1 supra.

"3. Upon proper application it would be the legal duty of the Trustees to grant plaintiff a permit to fill its privately owned submerged land, purchased from the Trustees, by use of materials from other sources."

Prior to oral argument of this cause before this Court, the [43] Appellee filed a motion to correct the judgment, as follows:

"Under the terms and provisions of the final judgment rendered by the lower court in this cause the appellee (plaintiff) was adjudged to have 'the lawful right to dredge material from the areas indicated on the appllication for a dredge and fill permit and to use such material to fill its privately owned submerged land indi-

cated on such application for a period of time consisting of 223 days beginning on the day this judgment becomes final by the expiration of the time of appeal, or the filing of the mandate of an Appellate Court affirming this judgment, whichever is the later date.'

"Final hearing in the court below occurred on March 3, 1970. At the time of submission of said cause to the lower court, a permit to dredge the area referred to in said judgment was awarded by the United States Department of the Army, Corps of Engineers, as a matter of course upon the receipt of an approval of such dredging by the Trustees of the Internal Improvement Fund. At that time the Corps of Engineers granted such permit to dredge as a mere formality when it appeared that such dredging would not interfere with navigation. As shown by the record in this cause the Corps had determined that the dredging of the area described in the judgment would not interfere with navigation and it had granted a permit to dredge, which permit is dated the 12th day of November, 1965, but which has now expired. (See Exhibit LL).

"After the submission of this cause to the lower court, and on April 3, 1970, the United States Congress passed Public Law 91-224, Section 1171 of which prohibited the United States Department of the Army, Corps of Engineers from granting a permit to dredge unless and until the Department of Air and Water Pollution Control of the State of Florida issued a cer-

tificate authorizing said dredging. A true copy of said Act is hereto attached, marked Exhibit A, and made a part hereof. The refusal of the State to issue said certificate requires the United States Department of Army Corps of Engineers to decline the issuance of a dredging permit.

"After the passage of the Public Law 91-224, the State of Florida, Department of Air and Water Pollution Control issued its notice and its certification information, a true copy of which is hereto attached and marked Exhibit B and made a part hereof which outlines the conditions and the requirements imposed upon the Appellee in order to procure a certification, which is essential before the Corps of Engineers will accept an application for the issuance of a dredging permit

"The acts and conduct of the State and Federal Governments which occurred subsequent to the submission of this cause on final hearing to the lower court will deprive the Appellee of the benefit of the judgment rendered by the lower court in which it was intended that the Appellee would receive [44] 223 clear days within which to accomplish the dredging authorized by said judgment for the reason that the procedures required of the Appellee in order to procure certification from the State and a Federal permit will consume a major portion, if not all, of said 223 days, if the running of said days commences from the day of the final determination of this cause in the Courts of Florida The appellee cannot

make application for its permit to the Corps of Engineers until a favorable and final determination of this litigation has occurred

"Thus, subsequent to the rendition of the judgment the procedures adopted both by the Federal and State Governments in connection with the issuance of a permit by the United States Department of the Army, Corps of Engineers, has been radically changed and the time required to acquire a permit has been lengthened to the point where the State and Federal authorities can through the natural delays provided by their present procedure, require of the appellee more than 223 days to acquire the Corps of Engineers' permit This would defeat the judgment of the lower court and deny to the appellee the rights assured to it by the said judgment

"Wherefore, in the event the District Court of Appeal of Florida, 1st District, affirms the judgment of the lower court, the appellee respectfully moves that the mandate issued upon such affirmance provide that the 223 day period accorded to the appellee as its period to dredge, as set forth in the judgment, shall begin to run on the day of the issuance of the permit by the United States Department of Army, Corps of Engineers and not on the day the judgment becomes final. See §59.34, F.S."

Therefore, in order not to defeat the judgment of the lower court and thereby deny the rights of the appl-

lee assured by the said judgment, this Court does hereby grant the motion of appellee and does extend the 223 day period accorded the appellee in the lower court's judgment as hereinafter provided.

Upon the call of this cause for oral argument, the Appellants announced that they wished to withdraw their appeal, and admitted in open court that the Appellee's motion had merit and that it would be unjust to cause the Appellee to lose the benefit of the judgment it recovered resulting from delays created by the enactment of the Federal law and by the action of the Department of Air and Water Pollution Control. The Appellants, however, urged that this matter should be considered and the motion granted by the trial [45] court rather than this Court. The Appellants sought to reserve the right to appeal from the lower court's order granting the Appellee's motion. There is no dispute about the matters set forth in the motion and it is not only within the power of this Court to assure to the Appellee the benefits of the fruitful judgment it has obtained, but it is this Court's duty to do so and avoid endless, fruitless litigation. From an examination of this directive covering the certification information required by the Department of Air and Water Pollution Control, it appears that the exact information required for certification has already been furnished to other departments of the state, including Appellants. The very issues suggested by the required application were actually the issues tried in the lower court and found in favor of the Appellee. It would be grossly unfair and contrary to the long recognized legal concept of terminating litigation and avoiding a multiplicity of legal action to now either expect or require the Appellee to start anew in the administrative departments of Government after it

has successfully established its position to a final conclusion in the Courts.

The judgment for the Appellee was rendered on September 10, 1970. The Appellants waited until July 14, 1971, after the call of the case on oral argument, to announce the withdrawal of this appeal. During this period of time the Appellee has been denied the use of his property, as ordered by the lower court. The Appellants frankly stated orally before the Court that they could give no assurance that they would not appeal an order rendered by the lower court upon said motion, even though they conceded it was meritorious. We think under these circumstances that we are required to bring this case to a final termination. It is, [46] therefore, ordered that the judgment in the lower court be amended so that the same shall read, as amended, that the Appellee shall have the lawful right to dredge material from the areas indicated on the application for a dredge and fill permit and to use such material to fill its privately owned submerged land indicated on such application for a period of time consisting of 223 days, beginning either on the day after the Army Corps of Engineers issues its final permit permitting the appellee to dredge and fill as aforesaid, or beginning on the first day after there are no legal impediments to the appellee commencing its filling operation. In all other respects the final judgment is affirmed.

Affirmed and motion to correct judgment granted.

CARROLL, DONALD, Acting Chief Judge, and RAWLS, J., CONCUR.

A-I

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA. CASE NO. 69-984

GABLES-BY-THE-SEA, INC., a Florida corporation,

Plaintiff,

vs.

REUBIN O'D. ASKEW, Governor of the State of Florida; DOROTHY W. GLISSON, Secretary of State; ROBERT L. SHEVIN, Attorney General; FRED O. DICKINSON, JR., Comptroller; THOMAS D. O'MALLEY, Treasurer; DOYLE CONNER, Commissioner of Agriculture; RALPH M. TURLINGTON, Commismissioner of Education; as Trustees of the Internal Improvement Trust Fund of the State of Florida, and JOEL KUPERBERG, Executive Director, Board of Trustees of the Internal Improvement Trust Fund;

Defendants.

FINAL JUDGMENT

This cause came on for hearing before the Court on February 11 on the Motion of the Defendants to Discharge the Rule Nisi entered in this cause January 21, 1972 and directed to the Board of Air and Water Pollution Control, and argument of counsel for the respective parties having been heard and the Court being advised of its opinion in the premises, it is thereupon

ORDERED and ADJUDGED:

1. The rule nisi is issued to the defendants directing them to show cause why the defendants should not approve the permit referred to in the Final Judgment of this Court rendered September 10, 1970 and affirmed and corrected on appeal by the First District Court of Appeals in Kirk, et al v. Gables By the Sea, Inc., 251 So.2d 880.

2. It appears to the Court that this case involved pure questions of law and that final judgment may be rendered herein on the questions of law which have been raised by [55] mentioned rule nisi and the Motion to Discharge same. The facts and issues have been fully discussed and set forth in the Final Judgment of this Court above mentioned and in the opinion of the First District Court of Appeals above cited.

3. The Court is of the view that the opinion and judgment of the First District Court of Appeals, above cited, has fully considered and disposed of the contentions between the plaintiff and the defendant, even though the defendant Board was not a party to proceedings prior to the issuance of the rule nisi by this Court. In the last analysis the issues involved are between the plaintiff on the one hand and the State of Florida, acting through its agencies, on the other. Though the Trustees of the Internal Improvement Fund and the Board of Air and Water Pollution Control and the Department of Air and Water Pollution Control are separate and distinct agencies of the State, they are nevertheless mere agencies of the State and the question before this Court is not whether the actions of one may be the actions of another but whether or not the State is bound by the results of litigation involving one of such agencies.

4. The First District Court of Appeals had before it the very circumstances concerning the effect of the Act of Congress passed as Public Law 91-224, Section 1171 and the certificate required of the Department of Air and Water Pollution Control. The following portions of said opinion appear to be dispositive of the problem before this Court:

> "From an examination of this directive covering the certification information required by the Department of Air and Water Pollution Control, it appears that the exact information required for certification has already been furnished to other departments of the state, including Appellants. The very issues suggested by the required application were actually the [56] issues tried in the lower court and found in favor of the Appellee. It would be grossly unfair and contrary to the long recognized legal concept of terminating litigation and avoiding a multiplicity of legal action to now either expect or require the Appellee to start anew in the administrative departments of Government after it has successfully established its position to a final conclusion in the Courts.
>
> The judgment for the Appellee was rendered on September 10, 1970. The Appellants waited until July 11, 1971, after the call of the case on oral argument, to announce the withdrawal of this appeal. During this period of time the Appellee has been denied the use of his property, as ordered by the lower court. The Appellants frankly stated orally before the Court that they could give no assurance that they would not appeal an

> order rendered by the lower court upon said motion, even though they conceded it was meritorious. We think under these circumstance. that we are required to bring this case to a final termination."

Accordingly, it's the judgment of this Court that the Plaintiff has completed all procedures required by law to entitle him to certification on behalf of the State of Florida that the derdge permits be issued and that it be given the full benefit that the judgment of this Court has approved and corrected by the opinion and decision of the First District Court of Appeals.

6. Deeming the defendants will discharge their legal duties, as authoritatively adjudicated by courts of competent jurisdiction, this Court will withhold the issuance of any coercive writ unless same shall become necessary to give effect to rights herein adjudged, jurisdiction being reserved for such purpose.

6. In all other respects this judgment may be deemed final in the dispositions of the questions of fact and law arising in this cause.

ORDERED and ADJUDGED in Chambers at Tallahassee, Florida this 16th day of February, A.D., 1972.

CIRCUIT JUDGE

[57]

A - J

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A.D. 1972.

CASE NO. 0-167.

REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, etc., et al.,

Appellants,

vs.

GABLES BY THE SEA, INC., a Florida corporation,

Appellee.

Opinion filed March 16, 1972.

An Appeal from the Circuit Court for Leon County.
Hugh M. Taylor, Judge.

Robert L. Shevin, Attorney General; and Howell L. Ferguson, Assistant Attorney General; and Philip S. Bennett and Herbert D. Sikes, for Appellants.

Gerald H. Wetherington; and Marion E. Sibley, of Sibley, Giblin, Levenson & Ward, for Appellee.

ON MOTION TO QUASH APPEAL

PER CURIAM.

Plaintiff-appellee has filed its motion to dismiss an appeal taken by the appellants or to peremptorily affirm the judgment of the lower court, which this Court treats as a motion to quash the appeal.

It appears to this Court that all issues involved in this cause were adjudicated in favor of the plaintiff in this Court's prior mandate filed August 31, 1971, which affirmed the judgment of the trial court. Said mandate encompassed all the affected agencies of the State of Florida. Pursuant to said mandate, the trial court issued a rule nisi directed to the Board of Air and Water [58] Pollution Control of the Department of Air and Water Pollution Control requiring it to show cause why it should not approve the permit referred to in the trial court's final judgment and the mandate of this Court affirming said judgment. The appellant moved to discharge said rule nisi, and the trial court entered final judgment ordering that the dredge permits be issued. It is from this judgment that appellants now appeal.

It is the conclusion of this Court that the appeal herein is dilatory in nature, is sought by appellants for the sole purpose of further frustrating and delaying compliance with the mandate of this Court and the final judgment of the trial court, is frivolous, and not taken in good faith. This Court does hereby conclude that the final judgment entered by the trial court is an appropriate order rendered in strict compliance with the mandate of this Court.

The motion of appellee to quash the appeal is granted and upon the going down of our mandate, the trial court is directed to institute such proceedings and to take such coercive action in the premises as is deemed necessary and advisable to secure full compliance with its order of February 16, 1972. In view of the inordinate delays already incurred in connection with the final disposition of this litigation, no petition for rehearing on this judgment will be entertained.

CARROLL, DONALD, Acting Chief Judge, RAWLS and JOHNSON, JJ., CONCUR.

A-Ka

Title 33, U.S.C. §1171(B) (4)

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters of the United States and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the license or permittee shall provide an opportunity for such certifying State or, if appropriate, the interstate agency or the Secretary to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable water quality standards will not be violated. Upon notification by the certifying State or, if appropriate, the interstate agency or the Secretary that the operation of any such federally licensed or permitted facility or activity will violate applicable water quality standards, such Federal agency may, afer public hearing, suspend such

license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Secretary, as the case may be, that there is reasonable assurance that such facility or activity will not violate applicable water quality standards.

A-Kb

Title 33, U.S.C. §1344

§1344. Permits for dredged or fill material

(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specifications of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is author-

ized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

June 30, 1948, c. 758, Title IV, § 401, as added Oct. 18, 1972, Pub. L. 92-500, § 2, 86 Stat. 884."

A-Kc

Title 42, U.S.C.

§4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

A-Kd

Code of Federal Regulations, §209.120(g)(1) and (2)

(g) Public hearing. (1) It is the Policy of the Chief of engineers to conduct his civil works program in an atmosphere of public understanding, trust, and mutual cooperation, and in a manner resposive to public needs and desires. To this end, public hearings are helpful and will be held whenever there appears to be sufficient public interest to justify such action. In case of doubt, a public hearing should be held.

(2) Among the instances warranting public hearings are general public opposition to isuance of a permit for work in navigable waters of the United States. District Engineers will notify the Division Engineers of the need for a hearing, state the proposed arrangements and obtain his concurrence. Public hearings will be held in connection with applications for permits in navigable waters of the United States when Congressional interests or responsible local authorities make an official and valid request therefor and such action will fulfill the above stated policy and objectives.

A-Ke

GENERAL RULES

RULE 10. MOTIONS

A. FILING. Every motion when filed shall be accompanied by a memorandum of law citing supporting authorities, and stamped addressed envelopes for each

party entitled to notice of the order when issued by the judge. The Clerk shall not accept for filing any motion which is not in conformance with this rule.

B. HEARINGS. No hearings will be held on motions unless set by the Court.

C. REPLY MEMORANDUM. Each party opposing a motion shall serve and file a reply memorandum not later than five days after service of the motion as computed in the Federal Rules of Civil Procedure. Failure to do so may be deemed sufficient cause for granting the motion by default.

D. MOTIONS PENDING ON REMOVAL. When an action or proceeding is removed to this Court with pending motions on which briefs have not been submitted, the moving party shall file and serve a memorandum in support thereof within five days after removal, or within five days after denial of any motion to remand. Each party opposing the motions shall then comply with paragraph C hereof.

E. NOTICE THAT ACTION IS AT ISSUE. All counsel shall have a continuing duty to notify the court promptly upon an action or proceeding becoming at issue.

F. MOTIONS TO TAX COSTS. Motions to tax costs in actions or proceedings shall be filed by the parties,

A-Kf

U. S. COURT OF APPEALS—RULES

RULE 18. SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 209.
Adopted Dec. 24, 1968.

A-L

[12] GABLES BY THE SEA, INC.

LEGAL DESCRIPTION:

All that land in the City of Coral Gables, Dade County, Florida, lying east of Red Road and south of Bella Vista Avenue, which is a part of the land shown in Plat Book 68, at page 60, of

the Public Records of Dade County, Florida, known as Coral Bay, which land when dredged and filled is designated as Blocks 15 through 24, inclusive, on said Plat, and also Blocks 25 and 26, Tract A, as shown on replat of a portion of Coral Bay, Section D, appearing in Plat Book 76, at page 69, of the Public Records of Dade County, Florida. All of said property lies west of bulkhead line of the City of Coral Gables, Florida.

EXHIBIT B

[13] DEPARTMENT OF THE ARMY

Note—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State consent to the work authorized. It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation. (See Cummings v. Chicago, 188 U.S., 410.) 10—13165-c

PERMIT

SAKSP 800.61 (56-188)

District Engineer, Corps of Engineers.
Jacksonville, Florida
18 June ....., 1956.

Gables Venetian Waterways, Inc.
6801 Granada Boulevard
Coral Gables 46, Fla.

Gentlemen:

Referring to written request dated 13 April 1956 I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army.

to dredge and fill, the dredged material to be contained by adequate dikes, in and connecting with Lower Biscayne Bay, westerly shore,

at your property, southerly from the mouth of Snapper Creek Canal and north of Shoal Point, in the City of Coral Gables, Dade County, Florida,

in accordance with the plans shown on the drawing attached hereto marked: Proposed Dredging in Biscayne Bay South of Snapper Creek and North of Shoal Point, Dade County, Florida,

Subject to the following conditions:

[14] (a) That the work shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material in the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Whitehall Building, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

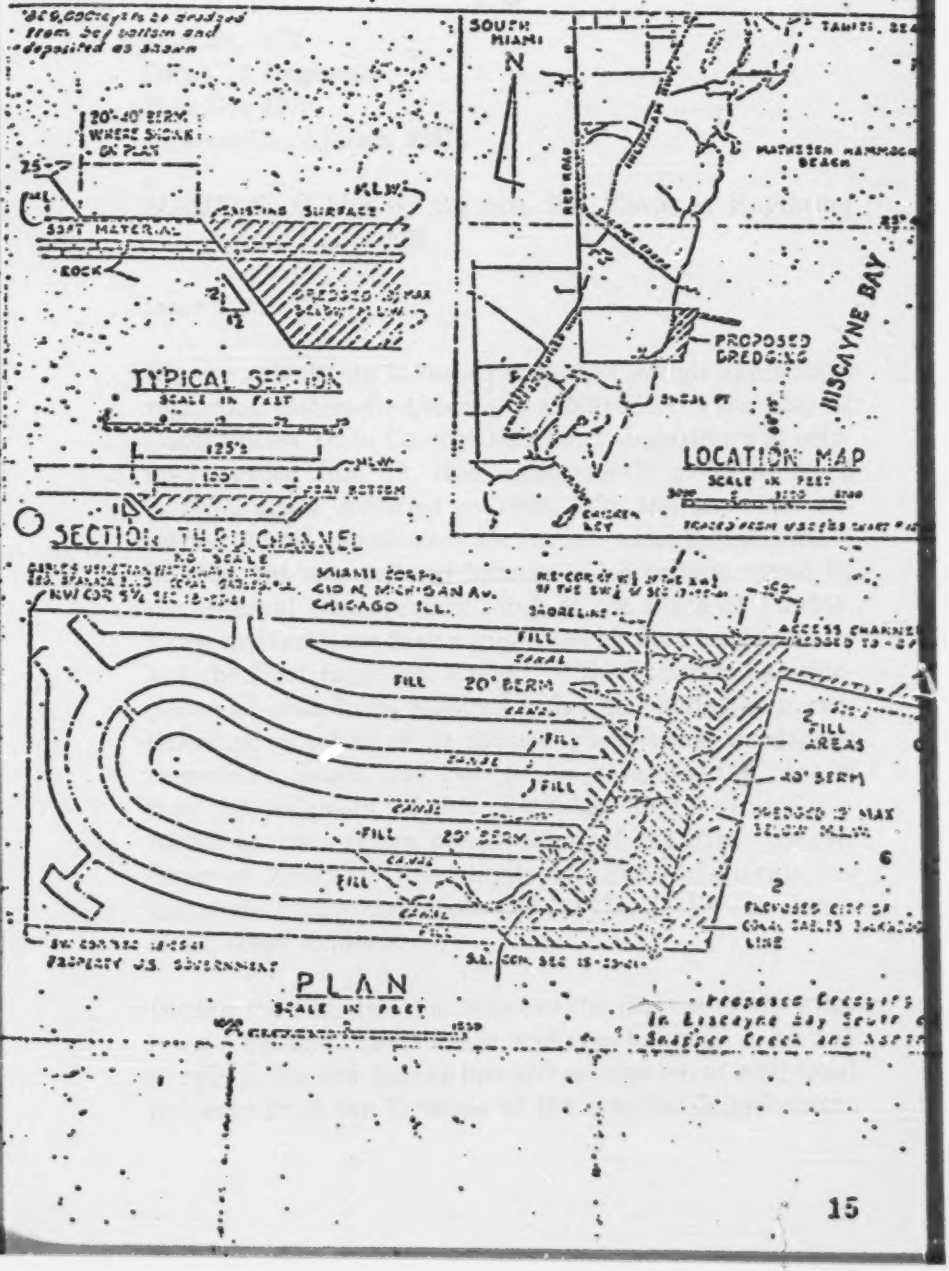
(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the 31st day of December, 1959, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

By authority of the Secretary of the Army:

/s/ E. E. KIRKPATRICK

E. E. KIRKPATRICK
Colonel, Corps of Engineers
District Engineer


20'-40' BERM WHERE SHOWN ON PLAN
EXISTING SURFACE
SOFT MATERIAL
ROCK
DREDGED TO MAX DEPTH BELOW MLW
TYPICAL SECTION
SCALE IN FEET
125'±
100'
MLW
SEAWALL
SEA BOTTOM
SECTION THRU CHANNEL
NO SCALE
SOUTH MIAMI
N
RED ROAD
SNAPPER CREEK
MATHESEN HAMMOCK BEACH
BISCAYNE BAY
PROPOSED DREDGING
SHOAL PT
CHICKEN KEY
LOCATION MAP
SCALE IN FEET
MIAMI DOCK CO.
410 N. MICHIGAN Av.
CHICAGO ILL.
SHORELINE
FILL
CANAL
20' BERM
FILL AREAS
40' BERM
DREDGED TO MAX BELOW MLW
PROPOSED CITY OF CORAL GABLES BULKHEAD LINE
PROPERTY U.S. GOVERNMENT
PLAN
SCALE IN FEET
Proposed Dredging in Biscayne Bay South of Snapper Creek and North

A-M

July 28, 1972
Corps of Engineers
P. O. Box 4970
Jacksonville, Florida 32211

SUBJECT: Gables By the Sea, Inc., Corps of Engineers Permit No. 56-188.

Dear Sirs:

We are submitting herewith a revised permit application regarding Gables-By-the-Sea, a subdivision in the City of Coral Gables, Dade County, Florida. This permit was originally issued June 18, 1956, subsequently modified April 9, 1957, again modified in 1960, 1962 and the time extended to 1965. Application for further extension was made in 1968, but was refused because of objections raised by the Internal Improvement Fund of the State of Florida. These matters have been adjudicated by the Florida Courts and the final judgment states: — "the Plaintiff has completed all procedures required by law to entitle him to certification on behalf of the State of Florida that the dredge permits be issued, and that he be given the full benefit that the judgment of this Court has approved and corrected by the opinion and decision of the First District Court of Appeals." Accordingly, the State of Florida has issued their necessary approvals for this project, as shown on attached exhibits.

During the time interval between the isuance of the original permit and this date, the land area has been re-platted to reflect the new harbor line and acquisition of additional property from the Trustees of the Internal Improvement

Fund. This has resulted in a revision in the filled area, although the harbor line is not changed. The area to be filled is presently zoned by the City of Coral Gables for single family residences, multi-family, and 2-3 story apartments, as shown on permit drawing. No building has been or will be constructed on the property until it has been filled to the elevation established by the City of Coral Gables.

Very truly yours,

CONNELL ASSOCIATES, INC.

/s/ Edmund Friedman

EF:nw
Attachments

FORM APPROVED
OMB NO. 49-R 0082

DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS

APPLICATION FOR PERMIT TO DISCHARGE OR WORK IN NAVIGABLE WATERS AND THEIR TRIBUTARIES

SECTION I. GENERAL INFORMATION

1. State	Application Number (to be assigned by Corps of Engineers)			
	Dis.	Dist.	Type	Sequence No.
— —	— — —	— — —	—	— — — — —

2. Name of applicant and title of signing official

Cables By the Sea, Inc.
Glenn C. Strona, Vice President

3. Mailing address of applicant

Cables By the Sea
12501 Red Road
Coral Gables, Florida 33156

4. Name, address, telephone number and title of applicant's authorized agent for permit application coordination and correspondence.

Consult Associates, Inc. Attention: E. Friedman
P. O. Box 677 305-642-3200
Miami, Florida 33135

NOTE TO APPLICANT: Refer to the pamphlet entitled "Permits for Work and Structures in and for Discharges or Deposits into Navigable Waters" before attempting to complete this form.

Required Information

a. All information contained in this application will, upon request, be made available to the public for inspection and copying. A separate sheet entitled "Confidential Answers" must be provided to set out information which is considered by the applicant to constitute trade secrets or commercial or financial information of a confidential nature. The information must clearly indicate the item number to which it applies. Confidential treatment can be accorded only for that information for which a specific written request of confidentiality has been made on the attached sheet. However, in no event will all indication of the contents and frequency of a discharge be recognized as confidential or privileged information.

b. The applicant shall furnish such supplementary information as is required by the District Engineer in order to evaluate fully an application.

c. If additional space is needed for any matter relative to any item on this form, attach a sheet entitled "Additional Information." Indicate on that sheet the item numbers to which the answers apply.

d. Drawings required by items 20 and 21 should be attached to this application. Other papers which must be attached to this application include, if applicable, one or more quality certifications or a written communication which describes water quality impact (see Item 22 and Item 10 of Section II below), the additional information sheet(s) on "a" above, and the confidential information sheet described on "a" above.

Fee

If any discharge or deposit is involved, an application fee of $100 must be submitted with this application. An additional $50 is required for each additional point of discharge or deposit.

Signature

a. If a corporation is involved, an application submitted by a corporation must be signed by the principal executive officer of that corporation or by an official of the rank of corporate vice president or above who reports directly to such principal executive officer and who has been designated by such principal executive officer to sign such applications on behalf of the corporation. In the case of a partnership or a sole proprietorship, the application must be signed by a general partner or the proprietor. Other signature requirements are discussed in the pamphlet.

b. If no discharge is involved, an application may be signed by the applicant or his authorized agent.

Application is hereby made for a permit or permits to authorize the activities described herein. I certify that I am familiar with the information contained in this application, and that to the best of my knowledge and belief such information is true, complete, and accurate.

Signature of Applicant: /s/

18 U.S.C. Section 1001 provides that:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

FOR CORPS OF ENGINEERS USE ONLY

Assigned name of applicant

Are discharge structures: Major? ☐ Minor? ☐ N/A? ☐

Date received, form not complete	— —	— — — — —	Date sent to EPA, form not complete	— —	— — — — —
Date received, form complete but additional data/info required	— —	— — — — —			
Date received, form complete	— —	— — — — —	Date sent to EPA, NOAA, DNI, AEC, FPC as complete form	— —	— — — — —
Date of Cert./Lic.	— —	— — — — —			
	day	mo yr		day	mo yr

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4. Date (mo / day / yr)	(Office use only)
July 28, 1972	

6. Check type of application: a. Original ☐ b. Revision ☒	7. Number of original application: 55-188

8. Name of facility where discharge or construction will occur.

Gables By the Sea, a development in the City of Coral Gables, Florida

9. Full mailing address of facility named in item 8 above.

Gables By the Sea
12301 Red Road
Coral Gables, Florida 33156

10. Names and mailing addresses of all adjoining property owners whose property also adjoins the waterway.

See attached list.

11. Check to indicate the nature of the proposed activity:
a. Dredging ☒ b. Construction ☐ c. Construction with Discharge ☐ d. Discharge only ☐

12. If activity is temporary in nature, estimate its duration in months.

If application is for a discharge:

13. List intake sources

Source	Estimated Volume in Million Gallons Per day or Fraction Thereof
Municipal or private water supply system	
Surface water body	
Ground water	
Other	

14. Describe water usage within the plant

Type	Estimated Volume in Million Gallons Per day or Fraction Thereof
Cooling water	
Boiler Feed water	
Process water	
Sanitary system*	
Other	

15. List volume of discharges or losses other than into navigable waters.

Type	Estimated Volume in Million Gallons Per day or Fraction Thereof
Municipal waste treatment system	
Surface containment	
Underground disposal	
Waste Acceptance Area	
Evaporation	
Consumption	

* Indicate number employees served per day

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MAY 71

If structures exist, or dredging, filling or other construction will occur, the present location of the activity must be given here.

(Office use only)

6. Name the corporate boundaries within which the structures exist or the activity will occur.

16. State: Florida 17. County: Dade 18. City or Town: Coral Gables

9. Name of waterway at the location of the activity

19. Biscayne Bay

20. Maps and sketches which show the location and character of each structure or activity, including any and all outfall devices, dispersive devices, and non-structural points of discharge, must be attached to this application.

21. For construction or work in navigable waters for which a separate permit is sought under 33 U.S.C. 403, the character of such construction must be fully shown on detailed plans to be submitted with this application. Note on the drawings those structures for which separate discharge information [section 21 of the form] has been submitted.

22. List all approvals or denials granted by Federal, interstate, State or local agencies for any structures, construction, discharges or dredging described in this application.

Type of document	Id. No.	Date	Issuing Agency
War Dep't. Permit	56-188	11/12/65	Corps of Engineers
Resolution	14825	5/13/69	City of Coral Gables, Fla.
Permit	-	6/19/72	Trustees of the Internal Improvement Fund, Florida
Dredge & Fill Certificate	-	6/15/72	Department of Pollution Control, Florida

23. Check if facility existed or was lawfully under construction prior to April 3, 1970. ☐

24. If dredging or filling will occur:

State the type of materials involved, their volume in cubic yards, and the proposed method of measurement.

Material will consist of some sand, some mud, and oolitic lime stone.

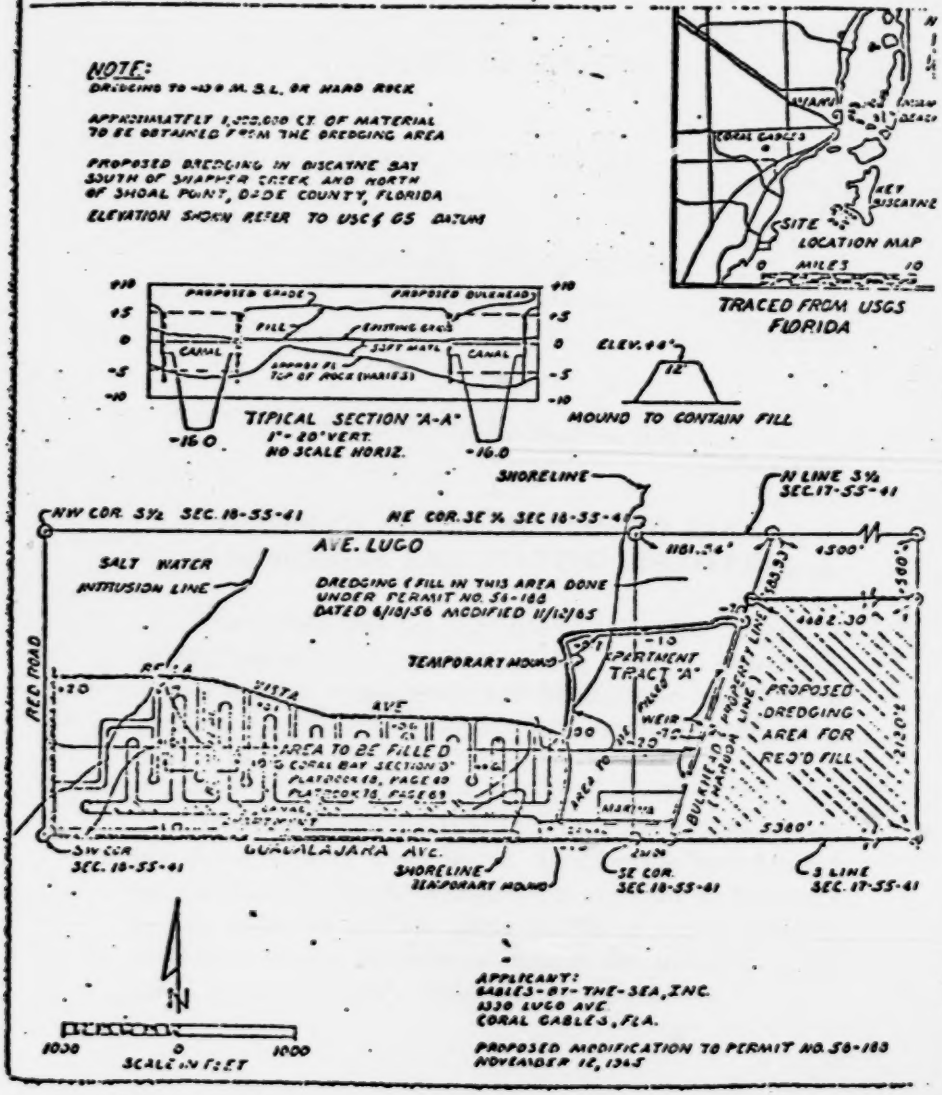
Estimated volume is 1,300,000 cu. yds. in place.

25. Describe the proposed method of containerization which will be used to measure the volume of any solids which may be deposited and to determine its effect upon the waterway.

Materials will be measured in place as deposited. Mounds will be constructed to enclose and contain the dredged material. Weirs will be located generally as shown.

26. State rates and periods of deposition described in Item 25.

Dredging must be completed within a period of 223 days after issuance of final Corps of Engineers permit in accordance with Florida Internal Improvement Fund Permit.


NOTE:
DREDGING TO -13.0 M.S.L. OR HARD ROCK
APPROXIMATELY 1,200,000 CY. OF MATERIAL TO BE OBTAINED FROM THE DREDGING AREA
PROPOSED DREDGING IN BISCAYNE BAY SOUTH OF SNAPPER CREEK AND NORTH OF SHOAL POINT, DADE COUNTY, FLORIDA
ELEVATION SHOWN REFER TO USC & GS DATUM
SITE LOCATION MAP
MIAMI
CORAL GABLES
KEY BISCAYNE
0 MILES 10
TRACED FROM USGS FLORIDA
PROPOSED GRADE
PROPOSED BULKHEAD
FILL
EXISTING GRADE
CANAL
SOFT MARL
APPROX. EL. TOP OF ROCK (VARIES)
+10
+5
0
-5
-10
-16.0
TIPICAL SECTION "A-A"
1"=20' VERT.
NO SCALE HORIZ.
ELEV. 6.0'
12'
MOUND TO CONTAIN FILL
SHORELINE
N LINE S½ SEC. 17-55-41
NW COR. S½ SEC. 18-55-41
NE COR. SE¼ SEC. 18-55-41
AVE. LUGO
SALT WATER INTRUSION LINE
DREDGING & FILL IN THIS AREA DONE UNDER PERMIT NO. 58-188 DATED 8/18/58 MODIFIED 11/12/65
1181.54'
4500'
160'
463.93'
462.30'
TEMPORARY MOUND
APARTMENT TRACT "A"
PROPOSED DREDGING AREA FOR FED'D FILL
PROPERTY LINE
BULKHEAD (HARBOR LINE)
RED ROAD
VISTA AVE
AREA TO BE FILLED
CORAL BAY SECTION 3
PLAT BOOK 18, PAGE 69
PLAT BOOK 18, PAGE 69
WEIR
PILES
AREA TO BE DREDGED
MARINA
5360'
SW COR. SEC. 18-55-41
GUAYALAJARA AVE.
SHORELINE
TEMPORARY MOUND
SE COR. SEC. 18-55-41
S LINE SEC. 17-55-41
N
1000
0
1000
SCALE IN FEET
APPLICANT:
GABLES-BY-THE-SEA, INC.
1330 LUGO AVE
CORAL GABLES, FLA.
PROPOSED MODIFICATION TO PERMIT NO. 58-188
NOVEMBER 12, 1965

A-N

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

Case No. 73-752-Civ-WM

GABLES BY THE SEA, INC.,
a Florida corporation,

Plaintiff,

-vs-

EMMETT C. LEE, JR., etc., et al.,

Defendants.

ORDER QUASHING NOTICES TO TAKE DEPOSITIONS AND STAYING DISCOVERY

The defendants having moved to quash notices of taking depositions in three separate cities on October 3, 4, and 5, 1973, respectively, and having also moved for a protective order, and the Court being advised in the premises, it is

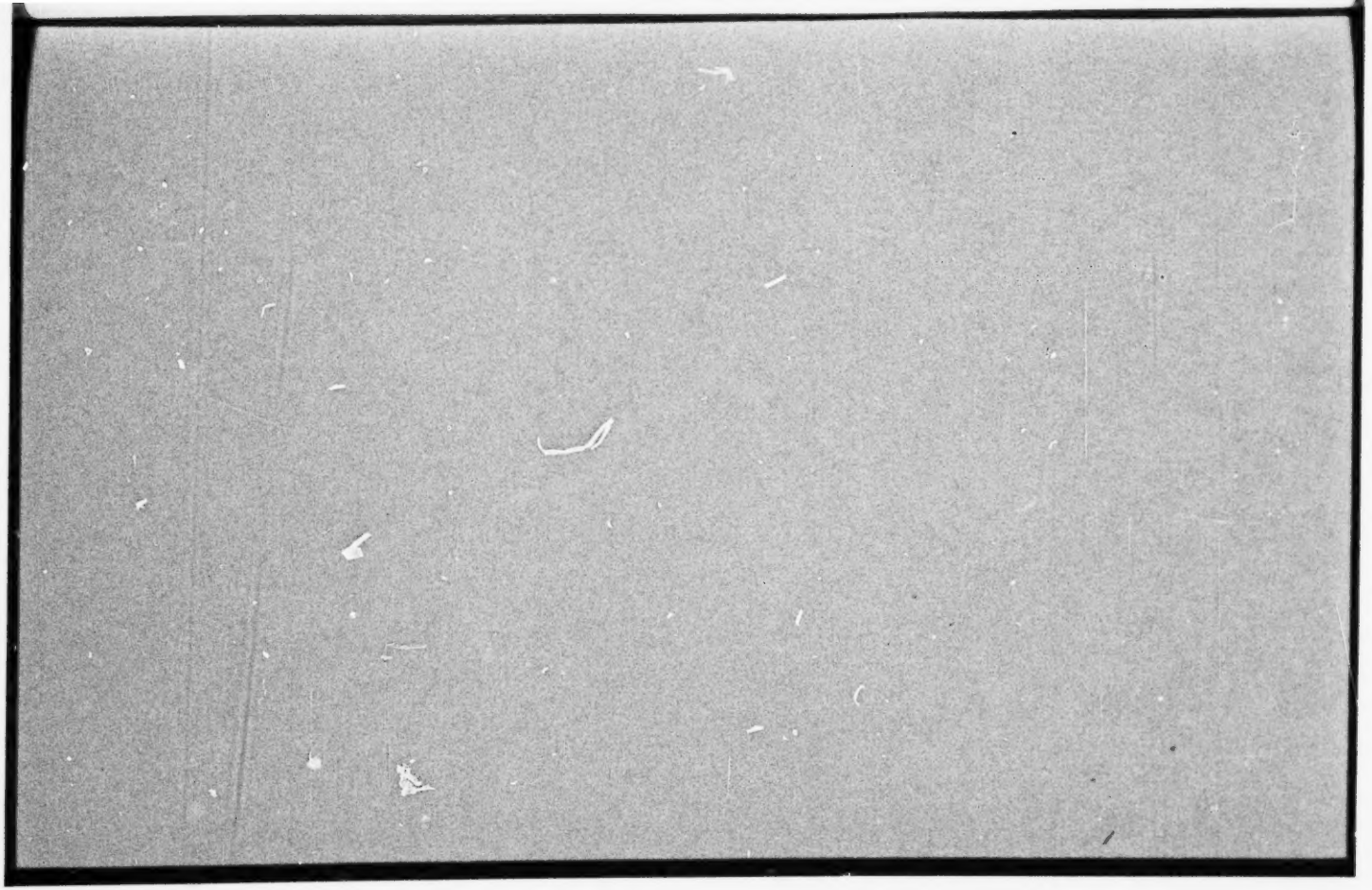
ORDERED and ADJUDGED that the notices of taking depositions in Vero Beach, Jacksonville and Atlanta be and the same hereby are quashed, and that all discovery in this cause be and the same hereby is stayed pending resolution of the defendants' motion for summary judgment, or until further order of the Court.

DONE and ORDERED at Miami, Florida, this 2nd day of October, 1973.

/s/ W. O. Mehrtens

United States District Judge

cc: Robert N. Reynolds,
Assistant U. S. Attorney
Marion E. Sibley, Esq.



SUPREME COURT, U. S.
FILED
NOV 12
MICHAEL RODAK, JR.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1974

No. 74-287

GABLES BY THE SEA, INC., a Florida corporation,
Petitioner,

vs.

EMMETT C. LEE, JR., ET AL.,
Respondents,

and

TROPICAL AUDUBON SOCIETY, INC., FLORIDA AUDUBON SOCIETY, INC., AND NATIONAL AUDUBON SOCIETY, INC.,
Respondents-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS-INTERVENORS IN OPPOSITION

PARKER D. THOMSON
SANFORD L. BOHRER
PAUL & THOMSON
Counsel for Respondents — Intervenors Tropical Audubon Society, Inc., Florida Audubon Society, Inc. and National Audubon Society, Inc.
1300 First National Bank Building
Miami, Florida 33131

S. FOWLER & CO., INC. — 325-7403 — 325-3351

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STATUTES AND REGULATIONS

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BRIEF FOR RESPONDENTS-INTERVENORS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court is reported at 365 F. Supp. 826, and is set out on pages 4-7 of the appendix to the Petition of Certiorari.[1] The memo-

[1]The appendix to the Petition for Certiorari will be abbreviated "Pet.App." The appendix to this brief will be referred to as "App."

randum opinion of the Court of Appeals is reported at 498 F.2d 1340, and is set out at Pet. App. 1.

JURISDICTION

Jurisdiction of the Petition for Certiorari in this action is vested in this Court by 28 U.S.C. §1254 and Rule 19(b) of the Rules of this Court.

However, the sole position of Respondents-Intervenors (collectively referred to herein as "Audubon") asserted to the Court of Appeals below is that the District Court lacked jurisdiction because the action presents no justiciable question. Petitioner's complaint in this action contends that its right to due process was abridged by denial by the United States Army Corps of Engineers (the "Corps") of Petitioner's application for a dredge and fill permit. Audubon contends the Corps lacked jurisdiction to accept and consider Petitioner's permit application by reason of Petitioner's failure to comply with the condition precedent to such consideration imposed by the Water Quality Improvement Act of 1970 (the "Water Quality Act").[1] Therefore the manner of the Corps' review of the permit application and the manner of the judicial review of the Corps' denial of the permit application present no justiciable questions to this Court.

---

[1]84 Stat. 91, 33 U.S.C. §1161, *et seq.* The Water Quality Act was amended, reorganized and expanded by the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, but the certification requirements remain equally stringent, and are now found at 86 Stat. 877, 33 U.S.C. §1341.

QUESTION PRESENTED

Whether a justiciable question is presented to this Court by judicial summary affirmance of a denial on the merits of an application for a dredge and fill permit by the United States Army Corps of Engineers, where the Corps lacked jurisdiction to accept and consider the permit application by reason of failure of the applicant to meet a statutory condition precedent to making such application.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C. §1161, *et seq.* and the pertinent regulations thereunder (40 C.F.R. §123, *et seq.*) are set forth in the appendix to this brief.

STATEMENT

On July 28, 1972 Petitioner submitted a permit application to the Corps to dredge and fill a finger canal project in Biscayne Bay, Florida. The application provided for dredging in the Bay seaward of the mean high water line and creating artificial "fingers" seaward of the mean high water line by filling with the dredged material.

The Water Quality Act requires, as a condition precedent to making such application to the Corps, that the applicable state certifying agency (here the Florida Department of Pollution Control) have previously certified

to the Corps that the proposed dredging and filling "will be conducted in a manner which will not violate applicable water quality standards." No such certification was submitted. In a letter to Petitioner from the Florida Department of Pollution Control dated May 15, 1972 the Department stated it had "never received an application for certification" from Petitioner and consequently was unable to determine whether "the project will be conducted in a manner that will not violate applicable water quality standards." (App. 14).

On September 18, 1972 Audubon filed in the Corps' proceeding Objections to Permit and Request for Hearing contesting, *inter alia,* the jurisdiction of the Corps to pass on Petitioner's permit application because Petitioner had not satisfied the statutory precondition to making application. The Corps did not rule on and by considering and denying the permit application on its merits inferentially rejected Audubon's Objections.

Petitioner then sought review of the Corps' action in the District Court and the Court of Appeals and Audubon moved to intervene before each Court to assert the same jurisdictional defect. The Department of Justice, which defended the Corps' denial on the merits, was unwilling to assert the Corps' lack of jurisdiction to deny Petitioner's permit application on its merits. The District Court denied Audubon's motion to intervene, but the Court of Appeals granted intervention.

ARGUMENT

Rule 23(1)(g) of the Rules of this Court requires that:

> "If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance."

Petitioner has made and can make no such showing.

Under the Water Quality Act each application for a permit to dredge and fill in navigable waters must undergo a two-stage agency review process. Initially the proposed activity is examined by the "certifying agency" of the state wherein the activity will take place. The certifying agency reviews the application to determine whether it can certify that there is reasonable assurance that the proposed dredging and filling "will not violate applicable water quality standards". If the certifying agency can so certify it issues a certification to the applicant for submission to the federal agency (usually, as here, the Corps), which being assured applicable water quality standards are not violated, passes on the merits of the permit application. Where certification is denied or has not been obtained by the applicant, the Act states "no license or permit shall be granted [by the federal agency]." 84 Stat. 108, 33 U.S.C. §1171(b)(1). (App. 2). See also 86 Stat. 878, 33 U.S.C. §1341(a)(1).

The permit application submitted by Petitioner to the Corps was defective on its face because it showed Petitioner had failed even to seek, much less obtain, certifica-

tion from the state certifying agency. In a letter to Petitioner dated May 15, 1972 the state certifying agency in this case, the Florida Department of Pollution Control informed Petitioner:

> ". . . the Department of Pollution Control has never received an application for certification on this project from Gables-by-the-Sea, Inc., has not reviewed and analyzed the project, *and consequently, does not, in fact, know whether or not there is reasonable assurance that the project will be conducted in a manner that will not violate applicable water quality standards of the State of Florida.*" (Emphasis added) (App. 14).

The Water Quality Act precludes consideration of a permit application by the Corps. until the applicant:

> ". . . shall provide the licensing or permitting agency [here the Corps] a certification from the State . . . that *there is reasonable assurance,* as determined by the State . . . *that such activity will be conducted in a manner which will not violate applicable water quality standards. . . .*" 84 Stat. 108, 33 U.S.C. 1171(b)(1) (App. 1).

and provides further that

> "No license or permit shall be granted until the certification required by this section has been obtained or has been waived [under circumstances not applicable here] . . ." 84 Stat. 108, 33 U.S.C. §1171(b)(1) (App. 2).

The Environmental Protection Agency Regulations on "State Certification of Activities Requiring a Federal License or Permit", 40 C.F.R. §123.2 (adopted November 25, 1971 and redesignated October 11, 1972), require:

> "(a) A certification made by a certifying agency shall include the following:
>
> * * *
>
> (2) A statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency . . . and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement described in subparagraph (3) of this paragraph;
>
> (3) *A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards; . . .*" (Emphasis added) (App. 8, 9).

§123.1 of the Regulations defines "certifying agency" as

> ". . . the person or agency designated by the Governor of a State, by statute, or by other governmental act, to certify compliance with applicable water quality standards." (App. 8).

The certifying agency in Florida is the Department of Pollution Control. The "applicable water quality standards", established pursuant to 89 Stat. 907, 33 U.S.C. §1160(c),[1] are set forth in the Rules of the Department of Pollution Control, Pollution of Waters, Chapter 17-3 Florida Administrative Code.

The "certification" submitted by Petitioner shows on its face that the Florida Department of Pollution Control never received an application from Petitioner for certification, much less made the statutorily required administrative review and issued certification based on such review. Instead, the only "certification" was "issued" by the Circuit Court of Florida, Second Judicial Circuit, pursuant to mandate of the District Court of Appeal of Florida, First District, which ordered the Department of Pollution Control to apply pen to paper to issue a "certification" never even applied for. The "certification" states:

> ". . . it should be noted that the Department of Pollution Control has never received an application for certification on this project from Gables-by-the-Sea, Inc., has not reviewed and analyzed the project, *and consequently, does not, in fact, know whether or not there is reasonable assurance that the project will be conducted in a*

[1]This section was added by Public Law 89-234, §5(a) to the Federal Water Pollution Control Act of 1948 which was amended, reorganized, and expanded by Public Law 92-500, the Federal Water Pollution Control Act Amendments of 1972, and its requirements, which remain substantively identical, are now covered for this type of action by 86 Stat. 844, 33 U.S.C. §1313. The Administrator of EPA has determined that Florida's standards meet the criteria of 33 U.S.C. 1160(c). 40 C.F.R. §120.10.

> *manner that will not violate applicable water quality standards of the State of Florida."* (Emphasis added) (App. 14).

In addition to its failure to comply with federal law, issuance of this piece of paper was in direct conflict with the Department of Pollution Control's own rules:

> "The [Florida Pollution Control] Board recognizes and will protect the interest of the Federal Government in interstate and coastal waters in accordance with the Federal Water Pollution Control Act, as amended." Section 17-3.01, Florida Administrative Code.

There being no certification in compliance with the 1970 Water Quality Act and other Federal Acts and Regulations, the Corps lacked jurisdiction to even consider Petitioner's application.

CONCLUSION

For the foregoing reasons it is respectfully submitted this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Parker D. Thomson

Parker D. Thomson
Sanford L. Bohrer
Paul & Thomson
Counsel for Respondents — Intervenors Tropical Audubon Society, Inc., Florida Audubon Society, Inc. and National Audubon Society, Inc.
1300 First National Bank Building
Miami, Florida 33131
(305) 371-5461

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondents-Intervenors in Opposition was served upon the following by mail this 12th day of November, 1974:

Mr. Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

Messrs. Marion E. Sibley
Allan M. Glaser
P. O. Box 390360
Miami Beach, Florida 33139

/s/ Parker D. Thomson

APPENDIX TO BRIEF OF RESPONDENTS-INTERVENORS TROPICAL AUDUBON SOCIETY, INC., FLORIDA AUDUBON SOCIETY, INC., AND NATIONAL AUDUBON SOCIETY, INC.

WATER QUALITY IMPROVEMENT ACT OF 1970

84 Stat. 108, 33 U.S.C. § 1171

(b) (1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that there is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it, and to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where such standards have been promulgated by the Secretary pursuant to section 1160(c) of this title, or where a State or interstate agency has no

authority to give such a certification, such certification shall be from the Secretary. If the State, interstate agency, or Secretary, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Secretary, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Secretary of such application and certification. Whenever such a discharge may affect, as determined by the Secretary, the quality of the waters of any other State, the Secretary within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate its water quality standards, and within such sixty-day period notifies the Secretary and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Secretary shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or

permitting agency. Such agency, based upon the recommendations of such State, the Secretary, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality standards. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Secretary, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Secretary, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with applicable water quality standards because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, or (C) the water quality standards applicable to such waters. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or if appropriate, the interstate agency or the Secretary, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has

been granted which changes may result in violation of applicable water quality standards.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters of the United States and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State or, if appropriate, the interstate agency or the Secretary to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable water quality standards will not be violated. Upon notification by the certifying State or, if appropriate, the interstate agency or the Secretary that the operation of any such federally licensed or permitted facility or activity will violate applicable water quality standards, such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Secretary, as the case may be, that there is reasonable assurance that such facility or activity will not violate applicable water quality standards.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under section 1160(h) of this

title that such facility or activity has been operated in violation of applicable water quality standards.

(6) No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

(7) In any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate at the end of the three-year period beginning on April 3, 1970, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this subsection.

(8) Except as provided in paragraph (7), any application for a license or permit (A) that is pending on April 3, 1970, and (B) that is issued within one year following April 3, 1970, shall not require certification pursuant to this subsection for one year following the issuance of such license or permit, except that any such license or permit issued shall terminate at the end of one year unless prior to that time the licensee or permittee submits to the Federal agency that issued such license or permit a certification and otherwise meets the requirements of this subsection.

(9) (A) In the case of any activity which will affect water quality but for which there are no applicable water quality standards, no certification shall be required under

this subsection, except that the licensing or permitting agency shall impose, as a condition of any license or permit, a requirement that the licensee or permittee shall comply with the purposes of this chapter.

(B) Upon notice from the State in which the discharge originates or, as appropriate, the interstate agency or the Secretary, that such licensee or permittee has been notified of the adoption of water quality standards applicable to such activity and has failed, after reasonable notice, of not less than six months, to comply with such standards, the license or permit shall be suspended until notification is received from such State or interstate agency or the Secretary that there is reasonable assurance that such activity will comply with applicable water quality standards.

ENVIRONMENTAL PROTECTION AGENCY REGULATIONS ON STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

(Adopted 36 FR 22387, November 25, 1971, redesignated 37 FR 21441, October 11, 1972)

PART 123 — STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

Subpart A — General

§ 123.1 Definitions.

As used in this part, the following terms shall have the meanings indicated below:

(a) "License or permit" means any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States.

(b) "Licensing or permitting agency" means any agency of the Federal Government to which application is made for a license or permit.

(c) "Administrator" means the Administrator, Environmental Protection Agency.

(d) "Regional Administrator" means the Regional designee appointed by the Administrator, Environmental Protection Agency.

(e) "Certifying Agency" means the person or agency designated by the Governor of a State, by statute, or by other governmental act, to certify compliance with applicable water quality standards. If an interstate agency has sole authority to so certify for the area within its jurisdiction, such interstate agency shall be the certifying agency. Where a State agency and an interstate agency have concurrent authority to certify, the State agency shall be the certifying agency. Where water quality standards have been promulgated by the Administrator pursuant to section 10 (c) (2) of the Act or where no State or interstate agency has authority to certify, the Administrator shall be the certifying agency.

(f) "Act" means the Federal Water Pollution Control Act, 33 U.S.C. 1151, et seq.

(g) "Water Quality Standards" means standards established pursuant to section 10 (c) of the Act, and State-adopted water quality standards for navigable waters which are not interstate waters.

§ 123.2 Contents of certification.

(a) A certification made by a certifying agency shall include the following:

(1) The name and address of the applicant;

(2) A statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency (specifically identifying the number or code affixed to such application) and

bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement described in subparagraph (3) of this paragraph;

(3) A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;

(4) A statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge or the activity; and

(5) Such other information as the certifying agency may determine to be appropriate.

(b) The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.

§ 123.3 Contents of application.

A licensing or permitting agency shall require an applicant for a license or permit to include in the form of application such information relating to water quality considerations as may be agreed upon by the licensing or permitting agency and the Administrator.

Subpart B — Determination of Effect on Other States

§ 123.11 Copies of documents.

(a) Upon receipt from an applicant of an application for a license or permit without an accompanying certification, the licensing or permitting agency shall either (1) forward one copy of the application to the appropriate certifying agency and two copies to the Regional Administrator, or (2) forward three copies of the application to the Regional Administrator, pursuant to an agreement between the licensing or permitting agency and the Administrator that the Regional Administrator will transmit a copy of the application to the appropriate certifying agency. Upon subsequent receipt from an applicant of a certification, the licensing or permitting agency shall forward a copy of such certification to the Regional Administrator, unless such certification shall have been made by the Regional Administrator pursuant to § 115.24.

(b) Upon receipt from an applicant of an application for a license or permit with an accompanying certification, the licensing or permitting agency shall forward two copies of the application and certification to the Regional Administrator.

(c) Only those portions of the application which relate to water quality considerations shall be forwarded to the Regional Administrator.

§ 123.12 Supplemental information.

If the documents forwarded to the Regional Adminis-

trator by the licensing or permitting agency pursuant to § 115.11 do not contain sufficient information for the Regional Administrator to make the determination provided for in § 115.13, the Regional Administrator may request, and the licensing or permitting agency shall obtain from the applicant and forward to the Regional Administrator, any supplemental information as may be required to make such determination.

§ 123.13 Review by Regional Administrator and notification.

The Regional Administrator shall review the application, certification, and any supplemental information provided in accordance with §§ 115.11 and 115.12 and if the Regional Administrator determines there is reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates, the Regional Administrator shall, no later than 30 days of the date of receipt of the application and certification from the licensing or permitting agency as provided in § 115.11, so notify each affected State, the licensing or permitting agency, and the applicant.

§ 123.14 Forwarding to affected State.

The Regional Administrator shall forward to each affected State a copy of the material provided in accordance with § 115.11.

§ 123.15 Hearings on objection of affected State.

When a licensing or permitting agency holds a public hearing on the objection of an affected State, notice of

such objection, including the grounds for such objection, shall be forwarded to the Regional Administrator by the licensing or permitting agency no later than 30 days prior to such hearing. The Regional Administrator shall at such hearing submit his evaluation with respect to such objection and his recommendations as to whether and under what conditions the license or permit should be issued.

§ 123.16 Waiver.

The certification requirement with respect to an application for a license or permit shall be waived upon:

(a) Written notification from the State or interstate agency concerned that it expressly waives its authority to act on a request for certification; or

(b) Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year).

In the event of a waiver hereunder the Regional Administrator shall consider such waiver as a substitute for a certification, and as appropriate, shall conduct the review, provide the notices, and perform the other functions identified in sections 115.13, 115.14, and 115.15. The notices required by section 115.13 shall be provided not later than 30 days after the date of receipt by the Regional Administrator of either notification referred to herein.

App. 13

STATE OF FLORIDA
DEPARTMENT OF POLLUTION CONTROL
Suite 300, Tallahassee Bank Building
315 South Calhoun Street, Tallahassee, Florida 32301

May 15, 1972

Dade County

Dredge & Fill Certificate
Corps of Engineers Permit No. 56188
Trustees Deed No. 21645 (253.124)

Received May 18 1972

Gables By the Sea, Inc.,
c/o Marion E. Sibley, Esquire
Sibley, Giblin, Levenson & Ward
605 Lincoln Road
Miami, Beach, Florida 33139

Subject: State certification in accordance with §21(b) Public Law 91-224

Gentlemen:

In accordance with the attached order of the Circuit Court of the Second Judicial Circuit, Leon County, Florida, the Department of Pollution Control issues its certification of the dredge and fill project proposed by Gables By the Sea, Inc. in South Biscayne Bay, Dade County, Florida, as outlined in the above noted documents.

However, it should be noted that the Department of Pollution Control has never received an application for certification on this project from Gables By the Sea, Inc., has not reviewed and analyzed the project, and consequently, does not, in fact, know whether or not there is reasonable assurance that the project will be conducted in a manner that will not violate applicable water quality standards of the State of Florida.

The applicant is cautioned that during the execution and/or maintenance of the subject project, addition of turbidity in excess of fifty (50) Jackson units as determined by the standard candle turbidimeter, above the background level and/or the direct or indirect effecting of the water quality in the aforementioned waterway in such a manner as to exceed the limitation of the concentrations of various constituents for such waters, as prescribed in Chapter 17-3, Florida Administrative Code, are violations of the water quality standards of the State of Florida. The applicant is hereby required to notify this agency of the schedule of the project.

Yours very truly,

/s/ W. E. Linne,

W. E. Linne, Chief
Bureau of Permitting

WEL/fmhj
cc: Corps of Engineers
Board of Trustees

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-287

GABLES BY THE SEA, INC., PETITIONER

v.

EMMETT C. LEE, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the respondents improperly denied its application for a permit to dredge and fill lands beneath the navigable waters of the United States because (1) they failed *sua sponte* to hold a public hearing and (2) they based the denial on widespread opposition to the application as well as on adverse environmental effects.

On July 28, 1972, petitioner submitted an application to the Corps of Engineers for an extension and modification of a dredging and filling permit, which had expired by its own terms on December 31, 1968 (Pet. App. 67-71). The permit was required under Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403. The application sought permission to dredge a portion of Biscayne Bay, Florida, in order to fill more than 50 acres of land bordering on the Bay and within the city of Coral Gables, Florida. Petitioner's plan envisioned a system of finger canals connecting with the Bay.

The Corps published public notice of petitioner's application on August 17, 1972 (A. 243-244),[1] and accepted comments until October 16, 1972. More than 500 letters of objection were received from nongovernmental individuals and groups (see, *e.g.*, App. Br. 49-66), as well as two letters from individuals in favor of the project.

The National Park Service objected that the project would disrupt sensitive biological communities in the nearby Biscayne National Monument (A. 97). The United States Department of the Interior's Fish and Wildlife Service stated that the project would "result in significant destruction and degradation of the marine resources of South Biscayne Bay" (A. 105, 107). The United States Environmental Protection Agency similarly objected to the project (A. 99).

The Florida Game and Fresh Water Fish Commission opposed the project, stating that it would "completely obliterate or degrade more than three hundred and fifty acres of biologically productive submerged land and tidal swamp, thus eliminating a significant portion of the Biscayne Bay ecosystem * * * " (A. 102, 104). The Florida Board of Conservation also opposed the project (App. Br. 44-48).

No state or federal agency commented favorably on the project.

The Corps gave petitioner an opportunity to present its views on the project's environmental effects and to answer the comments received in opposition to the project

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[1] "A." refers to the joint appendix before the court of appeals. "App. Br." refers to an appendix to appellees' brief before the court of appeals, in which certain documents from the administrative record were reproduced.

(A. 95-96). Petitioner thereupon submitted a report by Dr. Howard J. Teas concerning the effect of the project on the marine environment (A. 116-134) and a "Response to Agency Objections" by Dr. Teas (A. 109-116). In that response Dr. Teas admitted that "[t]he damage to marine organisms in the 55 acres that are to be filled is unquestioned * * * " (A. 111), but attempted to show that this land is of minimal ecological value (A. 111-114). Dr. Teas also attempted to show that the direct effect of the proposed dredging would be minimal (A. 115-116).

In his report, based on all the submissions received, respondent Lee, the Corps' District Engineer, summarized the comments received, concluded that there would be an "irreversible commitment of biologically productive areas" resulting in some ecological damage of an uncertain amount (Pet. App. 19, 23), noted the overwhelming opposition "by virtually all governmental agencies, citizens groups and even the Dade County Planning Department" (*id.* at 23), and requested authority "to deny the permit on the basis that the development would irretrievably commit biologically productive lands, lacks acceptability from both the public and private sector, and would not be in the public interest" (*ibid.*).

Lee's superiors concurred in his recommendation (App. Br. 89) and he was authorized to deny the permit (App. Br. 90). He then informed petitioner that its application was denied (Pet. App. 17-18). The reasons given included the project's destruction of "a biologically productive area in Biscayne Bay" and the objections of all governmental agencies commenting and more than 500 letters of opposition from the general public (*id.* at 18).

Petitioner filed this action in the United States District Court for the Southern District of Florida, which granted respondents' motion for summary judgment (Pet. App. 3-16). The court ruled that the Corps' decision should be set aside only if "arbitrary and capricious" (*id.* at 9-10), and, based on the entire administrative record, concluded that the decision should be upheld (*id.* at 11-14). The court also held that petitioner was not entitled to an administrative hearing under any statute or regulation and that, in any event, having had an opportunity to request a hearing, it elected not to do so, thereby waiving any claim to a hearing (*id.* at 7-9). The court of appeals summarily affirmed (*id.* at 1), and denied rehearing (*id.* at 2).

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and presents no question warranting review by this Court.

1. Petitioner's claim that it was denied due process when the Corps denied its application for a permit without a full public hearing is insubstantial. Petitioner's expectation that its permit would be reinstated did not constitute a "vested property" right (Pet. 4) of which it could constitutionally be deprived only after a hearing. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578.[2] In any event, the procedure followed here by the Corps, which gave petitioner the right to make written submissions in response to adverse comments on its

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[2]It is immaterial that petitioner obtained rulings in state court litigation, to which respondents were not parties, that it was entitled to certain permits under state law (Pet. App. 24-52). See, *e.g.*, *Di Vosta Rentals, Inc.* v. *Lee*, 488 F. 2d 674, 677 (C.A. 5), certiorari denied, 416 U.S. 984.

application, provided all the process that might have been constitutionally "due" in the circumstances. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895-896.[3]

. If petitioner thought it was entitled to a fuller opportunity to be heard, it could have so requested. Since it failed to do so either before or after its application had been denied, it ought not be heard now to complain. See *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37.[4]

The validity of the Corps' denial of petitioner's application without a hearing is not altered by any "cumulative effect" (Pet. 9) of the actions of the courts below in this case. The district court's obligation was to determine whether, on the basis of the administrative record before the court which had been the basis of the Corps' decision, the latter had acted arbitrarily in denying the application. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414-417; *Camp* v. *Pitts*, 411 U.S. 138, 142-143. See also *Greenleaf Johnson Lumber Co.* v. *Garrison,* 237 U.S. 251, 268. Accordingly, that question

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[3]While not raising the issue in its questions presented, petitioner asserts (Pet. 10) that a hearing was required by 33 U.S.C. (Supp. II) 1344, which was enacted after petitioner had filed its application. That statute, however, merely provides that the Secretary of the Army "may issue [dredge and fill] permits, after notice and opportunity for public hearings * * *." This provision was evidently intended to assure that opponents of such an application would be given an opportunity to be heard before a permit was *granted,* but does not require a hearing if the permit is to be denied. See also 33 C.F.R. 209.120(g)(1), (2) (1972) (Pet. App. 55).

[4]In light of the already extensive opposition to its application, petitioner might have preferred that there be no public hearing at which still further opposition could be voiced.

was properly determined by summary judgment (Fed. R. Civ. P. 56(c)); cf. *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1286 (C.A. 9)), and there was no need to take the depositions of the officials responsible for the decision, particularly in view of the uncontroverted affidavits before the court to the effect that the Corps' decision had been based on matters in the administrative record (Pet. App. 7). Cf. Fed. R. Civ. P. 56(e). Finally, the court of appeals' use of summary procedures in affirming the district court was proper. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4; *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275-276.

2. There is no merit in petitioner's contention that the denial of its application was invalid because the Corps considered, in addition to adverse environmental effects, the widespread and virtually unanimous opposition of state and federal governmental agencies and the public, which opposition was itself based on such adverse effects. It would be odd indeed if the Corps, which is required by statute to solicit the views of interested governmental agencies,[5] were precluded from taking them into account.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[5]See, *e.g.*, 16 U.S.C. 662; 42 U.S.C. 4321.